Supreme Court, U.S.
FILED
JUN 28 1999
OFFICE OF THE CLERK

99 - 7

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND A. HAIK; MARK C. HAIK,
Petitioners,

v.

TOWN OF ALTA, a political subdivision of the State of Utah; SALT LAKE CITY CORPORATION, a political subdivision of the State of Utah,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

NANCI SNOW BOCKELIE
(Counsel of Record)
PAUL T. MOXLEY LAW OFFICE
9 EXCHANGE PLACE
SUITE 1010
SALT LAKE CITY, UTAH 84111
(801) 363-7500

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

115PP

QUESTIONS PRESENTED

I

Under Utah Constitution Art. I § 22, when a municipality annexes land, representing that municipal services can be extended to the annexed land, does a subsequent purchaser of the land suffer a taking without compensation when the municipality denies the landowner the right to build any structure whatsoever by denying the landowner the very municipal services mentioned in the Annexation Ordinance?

II

Does a municipality violate a landowner's right to federal and state guarantees of equal protection by refusing to supply water to the landowner's property when the municipality has water available, is allowing increased commercial uses of water, annexed the property representing that municipal services could be extended to the property, and the landowner agrees to pay the costs of extending the necessary services?

PARTIES TO THE PROCEEDING

Petitioners

Raymond A. Haik and Mark C. Haik.

Respondents

THE TOWN OF ALTA, a political subdivision of the State of Utah, and SALT LAKE CITY CORPORATION, a political subdivision of the STATE OF UTAH.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT FOR GRANTING CERTIORARI 7

ARGUMENT I

Under *Lucas*, the government can only avoid compensation for a total taking if the proscribed use constitutes a nuisance under state law 9

ARGUMENT II

Because Petitioners have lost all economically beneficial use of their property, it matters not that they bought their property after the offending regulations were put in place 11

ARGUMENT III
The District Court and Court of Appeals misapplied Utah Law in holding that Alta did not violate Petitioners' rights to equal protection because Alta has no duty under Utah law to provide water to these Petitioners 14

ARGUMENT IV
Salt Lake City's reliance on environmental concerns does not justify its refusal to allow Alta to extend its water lines to Petitioners in light of the high level of commercial and residential development allowed elsewhere in Alta and the watershed 15

CONCLUSION 18

APPENDIX

Appendix A
Tenth Circuit Order and Judgment, 5/5/99 . . . . 1a

Appendix B
District Court Memorandum Opinion and Order, 10/31/97 . . . . . 17a

Appendix C
District Court Judgment in a Civil Case, 11/6/97 . . . . . 56a

Appendix D
Salt Lake City Ordinance No. 23 of 1991 . . . . 59a

Appendix E
Ordinance No. __ Policy Declaration of the Town of Alta 69a

Appendix F
Intergovernmental Agreement, Water Supply Agreement, Salt Lake City to Alta City 77a

TABLE OF AUTHORITIES

Cases

Bowles v. United States,
31 Fed Cl. 37 (Ct. Fed. 1994) . . . . . *passim*

Child v. City of Spanish Fork,
538 P.2d 184 (Utah 1975) 8, 16

Colman v. Utah State Land Board,
795 P.2d 622 (Utah 1990) 7, 9

Del Monte Dunes at Monterey, Ltd v. City of Monterey,
95 F.3d 1422 (9th Cir. 1995) 8, 11, 12, 18

Lockary v. Kayfetz,
917 F.2d 1150 (9th Cir. 1990) . . . . . *passim*

Lucas v. South Carolina Coastal Council,
505 U.S. 1002 (1992) 8, 9, 13

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1997) 7, 11, 18

Platt v. Town of Torrey,
949 P.2d 325 (Utah 1997) 14

Rose v. Plymouth Town,
173 P.2d 285 (Utah 1946) 14

Smith Inv. Co. v. Sandy City,
342 P.2d 245 (Ct. App. Ut. 1998) 13

Utah State Road Comm'n v. Miya,
526 P.2d 926 (Utah 1974) 8

Constitutions

U.S. Const., Amend. V 1
U.S. Const., Amend. XIV 1
Constitution of Utah Art. 1, § 7 2
Constitution of Utah Art. 1, § 22 . . . . . 2, 7

Statutes

28 U.S.C. § 1254 (1) 1
28 U.S.C. § 1331 4
28 U.S.C. § 1441(b) 4
28 U.S.C. § 2106 1
42 U.S.C. § 1983 . . . . . 2, 4

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not reported, but is available on Westlaw at 1999 WL 190717. A copy of the Opinion is included in the Appendix A at 1a -16a. The Opinion of the District Court for the Central District of Utah is not reported. A copy of that Opinion is included in Appendix B at 17a - 55a. The District Court's entry of judgment is included in Appendix C at 56a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its Order and Judgment April 5, 1999. No Petition for Rehearing was filed. This Petition for Writ of Certiorari is filed within 90 days of the filing of the Tenth Circuit's Order and Judgment. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. V

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the Untied States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Title 42, United States Code Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .

Constitution of Utah
Art. 1, § 7

No person shall be deprived of life, liberty or property, without due process of law.

Constitution of Utah
Art. 1, § 22

Private property shall not be taken or damaged for public use without just compensation.

Salt Lake City Canyon Water Sales Ordinance

Pertinent provisions of Salt Lake City's Canyon Water

Sales Ordinance, Title 17, Chapter 17.04 are provided at App. D at 59a - 68a.

Alta Annexation Ordinance

Alta's ordinance of annexation of the Albion Basin, where the property that is the subject of this case is located, is provided at Appendix E at 69a - 76a.

Water Supply Agreement

The Intergovernmental Water Supply Agreement dated August 10, 1976 between Alta and Salt Lake City is provided at Appendix F at 77a - 89a.

STATEMENT OF THE CASE

Petitioners, father and Son, own four platted lots in a subdivision that was annexed into the Town of Alta, Utah in 1981. Upon purchasing the lots in 1994, Petitioners requested that Respondent Alta, at Petitioners' expense, allow Petitioners to connect to Alta's municipal water and sewer services as provided in annexation proceedings, so they could obtain a building permit to build a residence. Alta first told Petitioners that it had no water available, and advised Petitioners that when they obtained water and satisfied other requirements, Alta would give them a building permit.

At substantial expense, Petitioners showed that Alta did, indeed, have excess water available. After Petitioners demonstrated this availability, Alta began asserting that its water supply agreement with Respondent Salt Lake City prevented Alta from providing town water to Petitioners' lots. The water supply agreement provided that water could be extended to the property with Salt Lake City's consent,

however. Alta did not disclose that fact in the annexation proceedings or to Petitioners. Alta never requested Salt Lake City's consent to extension of water to Petitioners' lots. Salt Lake City refused Petitioners' direct request for the extension.

During the same period Alta was refusing to consent to extend its water lines to allow residential development in the annexed area, Alta sought, and Salt Lake granted, consent to use Alta's water for snowmaking, both inside and outside Alta's 1976 town line. This use goes beyond both the geographical and the use restrictions in the water supply agreement.

Respondents' collusive acts prevent Petitioners from making any economic use of their property, and result in Petitioners being treated differently from other landowners in the town of Alta and Little Cottonwood Canyon.

Petitioners originally filed their complaint against Alta alone in State Court on February 2, 1996, seeking damages and equitable relief for infringement of their state and federal constitutional rights. Alta successfully moved to have Salt Lake City added as a necessary party. After the Haiks amended their complaint to add Salt Lake City, Salt Lake City removed the case to federal court pursuant to 28 U.S.C. § 1441(b) and 28 U.S.C. § 1331, on the basis of the Haiks' cause of action under 42 U.S.C. § 1983.

Petitioners filed a motion for partial summary judgment in the district court in November 1996 on their equitable claims, seeking judgment that the Water Supply Agreement by which Alta gets its water from Salt Lake City did not preclude extension of Alta's lines to Petitioners, and a ruling that by denying the Haiks access to Alta's municipal water and sewer, Alta and Salt Lake City had violated the

Haiks' rights to substantive due process and equal protection under the law.

Both Alta and Salt Lake City separately filed cross motions for complete summary judgment on January 27, 1997, including Petitioners' taking claim against Alta. After oral argument and extensive briefing, the court denied Petitioners' motion and granted the motions of Salt Lake City and Alta on both Petitioners' equal protection claim and taking claim, dismissing Petitioners' complaint. The court rendered its decision in a Memorandum Opinion and Order issued October 31, 1997, and entered final judgment on November 6, 1997. (*See* App. B and C.) Petitioners appealed to the Tenth Circuit, which affirmed the district court in an Order and Judgment entered April 5, 1999. (App. A).

The key facts in this case are:

- The entire town of Alta sits at the top of Little Cottonwood Canyon, a watershed for Salt Lake City. (App. B at 19a.) Little Cottonwood Canyon boasts two world renowned ski areas, Alta and Snowbird, and has numerous year-round and vacation homes, hotels, shops and other commercial establishments, both within and outside of Alta's town limits.

- Petitioners' lots are located in a platted subdivision with roads and electric and telephone service, that was outside Alta's town limits in 1976 but was annexed into Alta in 1981, pursuant to an Annexation Ordinance (App. E at 69a - 76a).

- In the Annexation Ordinance, Alta specifically stated that water and sewer for future development in the annexed area "are financed wholly from the funds of the affected developer or owner, through connection and development fees" (App. E at 74a ¶ 7).

- Alta has a municipal water system. It obtains its water from Salt Lake City, pursuant to an Intergovernmental Water Supply Agreement dated August 10, 1976 (the "Water Supply Agreement," attached as App. F hereto).

- At the time Petitioners sought water, Alta had available more than enough water under the Water Supply Agreement to serve Petitioners' property. (*See* App. B at 49a.)

- The Water Supply Agreement allows extension of Alta's waterlines beyond Alta's 1976 boundaries with the prior written consent of Salt Lake City. (App. F at 80a, ¶8).

- Despite Petitioners' willingness to pay the costs of connection, and representations in the Annexation Ordinance that water would be available for future development in such a case, Alta refuses to allow Petitioners to connect to Alta's water and sewer lines and never sought Salt Lake City's consent to extend its lines to Petitioners' lots.

- Salt Lake City has consented to the use of Alta's water outside the 1976 town line for snowmaking. (*See* App. B at 23a.) This represents both a geographic and a use extension of the Water

Supply Agreement. (*See* App. F at 80a, ¶¶ 8 and 9.)

- The Alta's 1976 town boundary does not follow any geographical or hydrological line, but is a purely political line that divides the hydrological Albion Basin in two.

ARGUMENT FOR GRANTING CERTIORARI

In granting and affirming summary judgment for Alta on Petitioners' taking claim, the district court and Tenth Circuit ignored the collusive actions of Respondents Alta and Salt Lake City to maintain Petitioners' private property as a public playground and to treat them differently from other similarly situated landowners. In doing so, the courts below deviated from decisions of this Court, the Supreme Court of Utah, and several other circuits that have implicitly answered, without squarely addressing, the taking issue presented here: Whether, and in what circumstances, a landowner who purchases his land after a regulatory scheme is in place, suffers a taking requiring compensation when the application of that regulatory scheme to his land prevents him from making any economic use of his property whatsoever.

While recognizing that the taking provision in Article I §22 of Utah's Constitution is broader than the Fifth Amendment of the United States Constitution (Tenth Cir. Order, App. A., at 14a), the Circuit Court found no compensable taking had occurred even under Article I §22 of Utah's Constitution. (*Id.* at 15a.) That decision misapprehends the scope of the taking that occurred here, and is contrary to the language and the decision of this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, (1997), the Utah Supreme Court in *Colman v. Utah State Land Board*,

795 P.2d 622 (Utah 1990), and a number of circuit court decisions including *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1995) *aff'd on other grounds*, 119 S.Ct. 1624, (1999); *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990) and *Bowles v. United States*, 31 Fed Cl. 37 (Ct. Fed. Cl. 1994), interpreting the admittedly narrower Fifth Amendment right.[1] Moreover, the Tenth Circuit's opinion misapplies the standard set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1002 (1992) for a categorical taking. Had the courts applied this precedent correctly, they would have denied Alta's motion for summary judgment on Petitioners' taking claim.

The decisions below also misapplied long standing precedent from this Court and the Utah Supreme Court in their analysis of Petitioners' equal protection claim. The courts below performed only the first half of the two-pronged test required to establish a violation of equal protection. *Child v. City of Spanish Fork*, 538 P.2d 184, 187 (Utah 1975); *Lockary v. Kayfetz*, 917 F.2d at 1155.

Protecting the watershed is a legitimate governmental objective. However, the courts failed to analyze whether the arbitrary, political line that divides land on which an owner can build from land on which an owner cannot build bears any relationship, rational or otherwise, to that objective. It does not; Respondent Alta's use of that line to deny residential development in one part of the watershed while allowing

---

[1] *See also Utah State Road Comm'n v. Miya*, 526 P.2d 926 (Utah 1974) (taking occurred when Road Commission built 25 foot tall viaduct that limited landowners' views and residual value, even though viaduct was built within the preexisting highway right-of-way).

commercial development in another part of the watershed is arbitrary and capricious and bears no relationship to protecting the watershed. This Court should remand the case to the district court for further proceedings.

ARGUMENT I

Under *Lucas*, the government can only avoid compensation for a total taking if the proscribed use constitutes a nuisance under state law.

The district court cited, but ignored, the holding of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1002 (1992), that a taking exists when the governmental action *either* (a) does not substantially advance a legitimate public purpose, *or* (b) denies the landowner all economically viable use of its property. *Id.* at 1016. Where the governmental act deprives the landowner of *all* economic use of the land, the government "may resist compensation only if the . . . nature of the owner's estate shows that the proscribed *use* interests were not part of his title to begin with." *Id.* at 1027 (emphasis added). Legislation that eliminates all economic use must derive from the state's law of private nuisance or its police power authority to protect against emergencies. *Id.* at 1029 & n. 16. *Colman v. Utah State Land Board*, 795 P.2d 622 (Utah 1990), on which the Tenth Circuit relied, reached the same conclusion: "It is not alleged that Colman was causing a nuisance on the property. Thus the case does not fall into the exception for the abatement of nuisances." *Id.* at 628.

The Federal Claims Court discussed the narrowness of the nuisance exception in *Bowles v. United States*, 31 Fed. Cl.

Ct. 37 (1994), explaining:

> In the case of a fee simple estate in land the government has the burden of proof to demonstrate that the prohibited use of the property constitutes a nuisance under state common-law doctrine. It cannot hide behind conclusory legislative findings that simply characterize land use restrictions as harm-preventing. . . .[2] In this case the so-called nuisance exception has little relevance. *All Mr. Bowles wanted to do was the same exact use as his surrounding neighbors; build a home in a residential subdivision.*

31 Fed. Cl. at 45-46 (internal citations omitted) (emphasis in original).

Building a home in a platted, improved residential subdivision has never been considered a "nuisance," even in as beautiful a place as Alta, Utah. *Bowles*, 31 Fed. Cl. at 51-52 ("development of a residential lot does not constitute a nuisance"). The circuit court erred in affirming the trial court's summary judgment for Alta in this case, because the regulations at issue have worked a categorical taking of Petitioners' land; they have resulted in the loss of any and all economic use of their land by Petitioners. Because Petitioners seek not to erect a nuisance, but simply a family home, the inquiry should have ended with a finding that a categorical taking had, indeed, occurred. Id. at 46. The courts erred in

---

[2] The Court in a footnote here cited Justice Kennedy's concurring opinion at 505 U.S. at 1035, to emphasize the narrowness of this exception.

entering and affirming summary judgment in favor of Alta on Petitioners' taking claim.

ARGUMENT II

Because Petitioners have lost all economically beneficial use of their property, it matters not that they bought their property after the offending regulations were put in place.

Both the district court and the circuit court found that Petitioners suffered no taking, relying on the fact that the regulations that prevent the Petitioners from getting sufficient water to obtain a building permit predated their purchase of the lots. That reasoning is contrary to numerous reported decisions of this Court and other circuits interpreting the admittedly narrower federal constitution protection against taking.

For example, the decisions below ignore Justice Scalia's rejection, in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), of the Commission's argument that the Nollans could not have had a reasonable expectation of being able to exclude the public from their beachfront just because the Coastal Commission had publicly announced its requirement for access easements before the Nollans' bought their property. 483 U.S. at 833, 834 n.2. That fact did not prevent the Court from finding a taking in *Nollan*, and it should not have prevented the courts below from finding a taking here.

The courts' reasoning below also conflicts with two recent Ninth Circuit decisions, *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996) *aff'd*

on other grounds, ___U.S.___, 119 S. Ct. 1624 (1999) and *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990).

In *Del Monte Dunes*, as here, the plaintiff purchased the land well after the regulatory scheme was in place. In fact, it was not the plaintiff but its predecessor in interest who had spent five years unsuccessfully attempting to obtain city approval of its development plan. The district court, circuit court and this Court all appeared completely unconcerned that the plaintiff had not purchased the land until well into the rejection process.

Although ostensibly relying on *Lockary* (*see* App. B at 47a-48a), the district court completely ignored the fact that several of the plaintiffs in that case did not purchase their land until the challenged moratorium that prevented them from getting water had been in place for eight to ten years. 917 F.2d at 1153. In *Lockary*, as in this case, the plaintiffs' inability to secure water prohibited them from building anything on their land. *Id.* at 1155. The Ninth Circuit reversed summary judgment in favor of defendants on plaintiffs' taking claims, and remanded for a determination of whether the inability to build constituted "more than a mere reduction in property value." *Id.* In finding that all the plaintiffs may indeed have suffered a compensable regulatory taking, the court did not distinguish between those plaintiffs who had bought their land prior to enactment of the moratorium and those who purchased after enactment. *Id.*

Particularly instructive on this issue is the discussion in *Bowles v. United States*, 31 Fed. Cl. 37 (1994). *Bowles* also involved a plaintiff who did not purchase his land until after passage of the offending regulation. At issue there was the application of Army Corps of Engineers' wetland permitting regulations to the plaintiff's land. Even though

Bowles knew of the Corps' permitting requirements through his positions as a board member and past president of the local utility district and founder of a local "watch-dog conservation group," *id.* at 42-43, the court found that Bowles had suffered a "categorical taking" under *Lucas*, because the permit denial prevented Bowles from making any "economically beneficial or productive use of the land." *Id.* at 45. In such a case, said the court, it didn't need to inquire into plaintiff's investment-backed expectations.[3] *Id.* at 46 & n.11. The court noted that regulations that remove all productive options for land, requiring that the land be left in its natural state, "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious harm." *Id.*, citing *Lucas*, 112 S.Ct. at 2899.

The mere existence of the regulatory scheme did not work the taking here; rather the taking occurred when the regulatory scheme was actually applied to Petitioners' property. *Cf. Smith Inv. Co. v. Sandy City*, 342 P.2d 245, 257-58 (Ct. App. Ut. 1998) (noting that a facial challenge narrows the scope of court's review). By denying the Petitioners water, Respondents have prevented all development of Petitioners' land, and have required Petitioners to keep it in its natural state for the enjoyment of all who come to Alta to ski, hike, bike, or simply enjoy the wildflowers - all without paying Petitioners any compensation.

---

[3] The court went on to examine Bowles' "investment-backed expectations" in the alternative, and found that Bowles' general knowledge of the permitting requirements did not require the court to impute actual knowledge to him that the permitting requirements applied to his property. The court found a taking occurred under either analysis. 31 Fed. Cl. at 46.

ARGUMENT III

The District Court and Court of Appeals misapplied Utah Law in holding that Alta did not violate Petitioners' rights to equal protection because Alta has no duty under Utah law to provide water to these Petitioners.

The courts below misapplied Utah Law in holding that Alta did not violate Petitioners' right to equal protection in refusing to allow Petitioners to conect to its waterlines. Municipalities in Utah may not arbitrarily refuse to provide water to their residents. *Platt v. Town of Torrey*, 949 P.2d 325, 329 (Utah 1997). Indeed, many years ago, the Utah Supreme Court in *Rose v. Plymouth Town*, 173 P.2d 285, 287 (Utah 1946), noted in dicta that "if the plaintiff had financed the cost of the extension and agreed to accept water at the prescribed rates in payment therefore, the remedy [mandamus to force a connection] might lie because the writ would then be for the purpose of compelling the town to perform a duty, a ministerial act about which it would have no discretion." *Id.* at 287.

Here, the very document by which Alta annexed the area containing Petitioners' lots indicates that future development was not foreclosed, and that water and sewer required to serve that development would be available – at the expense of the developers. (*See* App. E at 71a ¶2(a) (area to be annexed "cannot be serviced except through the Town of Alta . . .); 73a ¶4 (areas to be annexed "require delivery of intense high quality municipal services"); 74a ¶ 7, (water and sewer to new development to be financed by the developer)). Petitioners have at all times been willing to pay the cost of connection, yet Alta has made every effort to avoid doing

what it promised, implicitly in the annexation ordinance and explicitly in statements of the mayor at the time of annexation: To regularize the water supply to the upper Albion Basin, so that landowners could build on their already platted lots.

At the same time Alta has denied landowners in the upper Albion Basin the ability to build *anything*, it has approved significant construction in other areas, including a day lodge in sight of Petitioners' property. The day lodge, in the same hydrological basin as Petitioners' land, serves thousands of skiers a day during the winter months. All of these people use town water and sewer and impact the environment. The political line that divides the day lodge from Petitioners' property, Alta's 1976 town boundary, is entirely unrelated to the hydrology or geography of the watershed. The decision to allow significant development on one side of that arbitrary line but none on the other side violates the Petitioners' right to equal protection.

ARGUMENT IV

Salt Lake City's reliance on environmental concerns does not justify its refusal to allow Alta to extend its water lines to Petitioners in light of the high level of commercial and residential development allowed elsewhere in Alta and the watershed.

While their analysis differed, both the district court and the court of appeals found that Salt Lake did not violate the Petitioners' right to equal protection in refusing to consent

to the extension of waterlines to their lots.[4] Petitioners do not deny that protecting the environment in general, and an important city watershed in particular, is a laudable goal. Stating that goal does not end the inquiry, however. In addition, even under the rational relationship test, the means by which the government seeks to meet that goal must be rationally related to, and somehow advance, that goal.

Both courts below totally ignored this second prong of the rational basis test. Even that test "will not sustain conduct that is malicious, irrational or plainly arbitrary." *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990); *accord Child v. City of Spanish Fork*, 538 P.2d 184, 187 (Utah 1975) (classification itself must bear a reasonable relationship to a lawful purpose).

The courts' refusal to recognize that limitation of the rational basis test stands in stark contrast to the decision in *Lockary*. In *Lockary* the Ninth Circuit reversed summary judgment in favor of defendants on plaintiff's claim that the moratorium on new water hookups violated plaintiffs' rights to equal protection, because of evidence that the moratorium did not reduce water consumption. 917 F.2d at 1155-56.

Here, it is too late for Salt Lake to argue it must

---

[4] The district court held, without significant discussion, that because the City was selling water outside its boundaries, it was acting in its proprietary, not governmental capacity and therefore, Petitioners had no constitutional claim against it (Dist. Ct. Op., App. B, at 43a-44a.) The Tenth Circuit assumed, without deciding, that the denial constituted a governmental act for which constitutional remedies would lie, but found Salt Lake City's refusal rationally related to the goal of protecting the watershed. (10th Cir. Order, App. A, at 10a-12a.)

preclude development to protect the watershed quality. That horse was let out of the barn long ago. Plaintiffs produced undisputed evidence that the geographical limit in the Water Supply Contract has not limited development in the watershed, or even in the Albion Basin. As noted above, since 1976, many buildings have gone up in the very same Albion Basin in which Petitioners' property is located, including the day lodge in sight of Petitioners' property.

Salt Lake City has not tried to prevent such development, and in fact has encouraged increased use in the canyon, indeed within the annexed area, by allowing Alta to use its water for snowmaking on both sides of the 1976 town line. In doing so, Salt lake City has agreed to a use that not only goes beyond the geographical restriction in the Water Supply Agreement, but also the permitted uses. (*See* App. F at 80a ¶ 9 (water shall not be used for irrigation or sprinkling of any type)).

Virtually all of the recent development is designed to attract and serve the thousands of skiers and summer visitors to Alta, many of whom would not come into the watershed but for that development. Petitioners' lots differ from the allowed development only in their location relative to Alta's 1976 town line. If the 1976 town line followed a geographically or hydrologically significant boundary, using that line to delimit development could arguably be rationally related to the goal of watershed protection. It does not, however. The 1976 town line cuts right through the hydrological Albion Basin. It can thus bear no rational relationship to any desire to protect the watershed.

History and Salt Lake City's own planning documents show no intent to stop development in this watershed. Rather, they show a collusive desire to encourage use of the

watershed by allowing commercial building. At the same time, Respondents want to keep Petitioners' lots in their natural state for use as a public playground to serve those expanding commercial uses, without the need to pay for the land.

The courts' findings that treating *all* those on one side of Alta's 1976 town line one way and, and *all* those on other side of the line another way is consistent with equal protection misses the point; it presupposes that the line itself is not arbitrary. In fact, the line is completely arbitrary; it bears no relationship to any geographic or geologic feature. The disparate treatment of landowners on either side of that line amounts to nothing less than red-lining, a practice long recognized as violative of equal protection.

CONCLUSION

The Court of Appeals' decision in this case is inconsistent with the implicit bases underlying the holding in *Nollan, Del Monte Dunes, Lockary and Bowles*. It ignores the need, even under a rational basis test, to find a relationship between the distinction drawn and the ends sought to be advanced.

The Court should grant certiorari because this case provides it a vehicle to provide much needed guidance on the taking issue. As Chief Judge Smith of the United States Court of Federal Claims said in *Bowles*:

> This case presents in sharp relief the difficulty that current takings law forces upon both the federal government and the private citizen. The government here had little guidance from the law as to whether its action was a taking in

> advance of a long and expensive course of litigation. The citizen likewise had little more precedential guidance than faith in the justice of his cause to sustain a long and costly suit in several courts. There must be a better way to balance legitimate public goods with fundamental individual rights.

31 Fed Cl. at 39. The Court should grant this Petition for a Writ of Certiorari.

/s/_____
Nanci Snow Bockelie
(Counsel of Record)
Paul T. Moxley Law Office
9 Exchange Place, Suite 1010
Salt Lake City, Utah 84111
(801) 363-7500

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed April 5, 1999]

No. 97-4202
(D.C. No. 96-CV-732-J)
(Dist. of Utah)

RAYMOND A. HAIK; MARK C. HAIK, *Plaintiffs-Appellants,*	)
v.	)
TOWN OF ALTA, a political subdivision of the State of Utah; SALT LAKE CITY CORPORATION, a political subdivision of the State of Utah, *Defendants-Appellees.*	)

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be

Before **BRISCOE, BARRETT, and MURPHY** Circuit Judges.

Raymond A. Haik and Mark C. Haik (the Haiks) appeal the district court's grant of summary judgment in favor of defendants, the Town of Alta (Alta) and Salt Lake City Corporation (Salt Lake City) on their equal protection and taking claims.

Background

In October, 1994, the Haiks purchased lots 25, 26, 29, and 30, of the Albion Basin Subdivision #1 (Albion Basin) located above the Alta and Snowbird ski resorts at the top of Little Cottonwood Canyon, east of Salt Lake City, Utah. The Haiks then contacted Alta regarding water and sewer services for their lots. Alta responded in November, 1994, that it does not provide water and sewer services to Albion Basin and referred the Haiks to Salt Lake City's Department of Public Utilities, Water Division. In April, 1995, the Haiks requested applications for building permits and sewer and water services from Alta. Alta responded that it would be premature to begin the building permit process until the Haiks had procured adequate water and approval for a full containment sewage holding tank. The Haiks then sought information from Salt Lake City regarding water service to Albion Basin. In 1996, Salt Lake City notified the Haiks that it declined to consent to the extension of Alta water pipes and water supply to Albion Basin, relying on paragraph 8 of the 1976 Water Supply Agreement and the 1991 Watershed Ordinance, § 17.04.020

---

cited under the terms and conditions of 10th Cir. R. 36.3.

of Salt Lake City's Ordinances.

Alta receives its water supply from Salt Lake City by virtue of the August 12, 1976, INTERGOVERNMENTAL AGREEMENT-WATER SUPPLY AGREEMENT SALT LAKE CITY TO ALTA CITY (the 1976 Water Supply Agreement). (Appellants' App. Vol. I, Tab 9.) The 1976 Water Supply Agreement "make[s] available to Alta for its use, . . ., the normal flow of raw, untreated water, not to exceed 265,000 gallons per day, ..." *Id.* at 97 ¶1. Paragraph 8, relied on by Salt Lake City, contains the following restriction:

> 8. It is expressly understood and agreed that said pipelines shall not be extended to or supply water to any properties or facilities not within the present city limits of Alta without the prior written consent of [Salt Lake] City.

Id. at 99 ¶8. It is undisputed that Albion Basin lays beyond the 1976 Alta city limits. It is also undisputed that the Board of Health required lots to be supplied with 400 gallons of water per day as a precondition for issuance of a building permit and that the lots were each entitled to only 50 gallons of water per day from a water agreement with Little Cottonwood Water Company.

In October, 1997, the Haiks initiated this action, claiming that because Alta has surplus water and the lots are located within the current town limits, Alta had a legal duty to supply water to their lots based on Alta's historical conduct

and applicable state and federal laws.[1] *Id.* Vol. I at 6 ¶20. The Haiks contended that: (1) Alta had taken and damaged their property for public use by refusing to extend its municipal services to Albion Basin and by its refusal to grant them a building permit, in violation of Article I, Section 22 of the Utah Constitution, *id.* at 11 ¶ 39; (2) Alta's actions in furtherance of its policy of non-development have been arbitrary and capricious, depriving them of their right to substantive due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, *id.* at 13 ¶ 47; (3) Alta's actions deprived them of their rights to substantive due process and equal protection of the law under Article I, Sections 7 and 24 of the Utah Constitution and violated the Annexation Ordinance and Utah Code section 10-2-401(4), which required Alta to make the same level of municipal services available to their property as it does to others, *id.* at 14 ¶50; (4) they were entitled to a declaration that the 1976 Water Supply Agreement does not preclude the extension of Alta's water lines to their lots; *id.* at 15 ¶54; and (5) they were entitled to an injunction preventing Salt Lake City from raising the 1976 Water Supply Agreement as a defense to the extension of Alta's water lines and requiring Alta to make municipal services available to their lots in order to receive a building permit, *id.* at 16 ¶59.

On October 31, 1997, the district court granted

---

[1] The Haiks initiated this action in the Third Judicial District Court in and for Salt Lake County, State of Utah. (Appellants' App. Vol. I at 1 .) Salt Lake City removed the action to federal district court. *Id.* at 34.

summary judgment in favor of Alta and Salt Lake City. *Id.* Vol. III at 853-81. On the Haiks' equal protection claim against Alta, the district court concluded that the claim "presupposed the existence of a legal a duty on the part of Alta to supply water to property owners such as the Haiks, as well as the legal and physical capacity to do so." *Id.* at 860. The court then noted that while Alta may have the physical capacity to supply water to the Haiks' lots, Alta does not have the legal capacity to do so under the terms of the 1976 Water Supply Agreement, without Salt Lake City's consent. *Id.* at 865-66. On the Haiks' equal protection claim against Salt Lake City, the court found that: (a) the Haiks "failed to establish that Salt Lake City had breached any duty [to] reasonably... give or refuse consent, whether under the implied covenant of good faith dealing, or otherwise," *id.* at 872, and (b) equal protection is not available to challenge Salt Lake City's exercise of its contractual power to consent pursuant to paragraph 8 of the 1976 Water Supply Agreement because it had no legal duty to furnish water to users outside its own city limits, be they "similarly situated" or not, *id. at* 873-74. On the Haiks' annexation claim, the district court concluded that they failed to establish an express legislative or contractual duty on the part of Alta to supply water to their property and Alta cannot be fairly burdened with an implied legal duty to supply water that Alta has no legal fight to use. *Id.* at 869. The court then rejected the Haiks' taking claim against Alta on the ground that "neither the Haiks nor the Town of Alta ha[d] available the water necessary to make an 'economically viable use' of the Albion Basin property through construction of residential dwelling," *id. at* 877, and the Haiks retain the "'full 'bundle' of property fights' they purchased," *id.* at 875. The court reasoned that if the loss of economic viability is caused by something other than the

government regulation, it does not constitute a taking. *Id.* at 877.

On appeal, the Haiks contend that the district court erred: (1) in concluding that they could not bring an equal protection claim against Salt Lake City because it was acting in a proprietary capacity in supplying water outside its corporate limits; (2) in concluding that Alta did not violate their fight to equal protection by refusing to extend its water lines to their lots, in view of the district court's finding that Alta was physically able to supply water and they were willing and able to pay the costs of connection; (3) in failing to recognize that Salt Lake City's refusal to consent to Alta's extension of water to their lots could not be reasonable where it was not based on any finding that their proposed use would be detrimental to the watershed, but on a collusive desire to prevent any development in the upper Albion Basin; and (4) in determining no taking occurred even though they are completely unable to build on their lots.

We review the district court's order granting summary judgment *de novo,* applying the same standard as the district court. *Thomas v. International Bus. Machs.*, 48 F.3d 478, 484 (10th Cir. 1995). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "We examine the factual record and reasonable inferences therefrom in the light most favorable to [the non-movants], who opposed summary judgment." *Thomas,* 48 F.3d at 484.

Discussion

I. Equal Protection

The Haiks argue that they have asserted a viable equal protection claim against Salt Lake City. The Haiks maintain that: (1) Salt Lake City's refusal to consent to the extension of Alta's water lines to their property is a governmental act subject to equal protection challenges, and (2) even if Salt Lake City acted in a proprietary rather than a governmental capacity, equal protection challenges may be raised against governmental entities acting in their propriety capacities. The Haiks declare that Salt Lake City's refusal to consent to Alta's extension of its water lines to their lots could not be reasonable in that it was not based on any finding that their proposed use would be detrimental to the watershed, but on a collusive desire to prevent any development in the upper Albion Basin.[2] In addition, the Haiks reason that the district court erred in concluding that Alta did not violate their right to equal protection by refusing to extend its water lines to their lots, in view of the district court's finding that Alta was physically able to supply water and they were willing and able to pay the costs of connection.[3]

---

[2] We assume for the purposes of this discussion only that the Haiks may maintain an equal protection claim against Salt Lake City.

[3] The Haiks initially brought their equal protection claim under both the United States Constitution and the Utah Constitution. It is unclear whether the district court considered their equal protection claim under both state and federal law or solely

A. Federal Equal Protection

> According to the Equal Protection Clause of the Fourteenth Amendment, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill,* 521 U.S. 793, ____, 117 S.Ct. 2293, 2297, 138 L.Ed.2d 834 (1997). Unless a legislative classification or distinction burdens a fundamental fight or targets a suspect class, courts will uphold it if it is rationally related to a legitimate end. *Id.*

Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504, 532 (10th Cir. 1998).

"The interest in water for real estate development is not a fundamental right." *Lockary v. Kayfetz,* 917 F.2d 1150, 1155 (9th Cir. 1990). *See also 0 'Neal v. City of Seattle,* 66 F.3d 1064, 1067 (9th Cir. 1995) (equal protection claim based on denial of water service reviewed under rational basis standard because it affects only economic interests, not fundamental rights); *Magnuson v. City of Hickory Hills,* 933 F.2d 562, 567 (7th Cir. 1991) ("We do not consider the right to continued municipal water service such a fundamental

---

under state law. It is also unclear under which their appeal lies. However, in the interests of finality, we will consider their claim under both federal and state law.

right; . . . ."); *Ransom v. Marrazzo,* 848 F.2d 398, 413 (3d Cir. 1988) (strict scrutiny not required because water service is not a fundamental right); *Chatham v. Jackson,* 613 F.2d 73, 80 (5th Cir. 1980) (water service not a fundamental right). Thus, to meet a constitutional challenge the state action in question needs only some rational relation to a legitimate state interest. *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976); *Tonkovich, 159* F.3d at 532. Moreover, because state action subject to rational basis review is presumptively constitutional, the burden is on the plaintiffs to establish that the state action is irrational or arbitrary and that it cannot conceivably further a legitimate governmental interest. *Riddle v. Mondragon,* 83 F.3d 1197, 1207 (10th Cir. 1996). "Under the rational basis test, if there is a 'plausible reason[] for [the state] action, our inquiry is at an end.'" *United States v. Castillo,* 140 F.3d 874, 883 (10th Cir. 1998) (quoting *United States R.R. Retirement Bd v. Fritz,* 449 U.S. 166, 179 (1980)). "We need not find that the legislature ever articulated this reason, nor that it actually underlay the legislative decision, nor even that it was wise." *Id.* (citations omitted).

There are plausible reasons for Alta's refusal to extend its water lines to the Haiks' property. Alta has a legitimate state interest in not breaching its 1976 Water Supply Agreement. Alta does not have an independent right to water; it merely purchases water from Salt Lake City. Thus, while Alta may have the physical capacity to supply water to the Haiks' lots, it does not have the legal right to do so, and to compel Alta to breach its contract would be unreasonable. Nor, we add, does Alta have a legal obligation under Utah law to provide the Haiks with water. A series of Utah Supreme Court cases have specifically expressed that "a municipal corporation . . . does not have a legal duty to

provide water service to all members of the public . . . ." *Thompson v. Salt Lake City Corp.*, 724 P.2d 958, 959 (Utah 1986). *See Rose v. Plymouth*, 173 P.2d 285, 286 (Utah 1946). The Utah Supreme Court recently reinforced that a municipality need only act "reasonably" with respect to the provision of municipal services to its residents. *See Platt v. Town of Torrey*, 949 P.2d 325,329 (1997). We find Alta treated the Haiks reasonably here.

Furthermore, Salt Lake City has a legitimate interest in preserving its watershed. The Haiks failed to establish that Salt Lake City's refusal to consent to the extension of Alta's water lines to their property was irrational or arbitrary or that it could not conceivably further a legitimate governmental interest in view of the extensive evidence presented by Salt Lake City regarding preservation of its watershed, Little Cottonwood Canyon. The Haiks challenge Salt Lake City's stated interest in protecting the watershed by noting Salt Lake City has consented to other extensions and uses not contemplated by the 1976 Water Supply Agreement. The additional uses referred to are Alta's 1995 extension, without Salt Lake City's consent, of its lines to the Alpenglow Lodge, Salt Lake City's consent in 1988 and again in 1993 to allow Alta Ski Lifts Company to use additional water for snowmaking, and Salt Lake City's consent in 1992 to provide water to the U.S. Forest Service for recreational purposes at the Albion Basin campground. Because Alpenglow sits within Alta's 1976 boundaries, extension of the lines without Salt Lake City's consent was appropriate and is irrelevant to plaintiffs' claim of unequal and irrational treatment. This same explanation applies to Salt Lake City's 1988 consent for snowmaking purposes, which was similarly limited. Finally, the City's 1992 consent to allow the Forest Service to use

water for recreational purposes and 1993 consent to allow additional snowmaking were authorized by 1991 Salt Lake City ordinance § 17.04.020.B, which authorized the City to consent only to use for snowmaking or fire protection, use by certain governmental entities on land owned or leased by those entities, and use by residential property owners with a spring on their property. *See* Appellant's App. at 327-28. Significantly, § 17.04 prohibits the City from consenting to any use - including extension of Alta's water lines to the Haiks' property - other than these three articulated uses, or amending any current permit to enlarge the service boundary or increase the water supply. *See id.* at 327. The Salt Lake City Council has made a rational legislative determination that the particular uses above, even if outside existing service areas, will not result in significant harm to the watershed, whereas increased residential and commercial use outside existing service areas (in this case Alta's 1976 town boundaries) will result in such damage. This classification is rational and is related to the City's stated objective of protecting the watershed.

In short, Alta and Salt Lake City proffer they had to draw the line somewhere, and chose to do so in the 1976 Agreement at Alta's 1976 town boundaries. They do not claim to be seeking to stop all development in the canyon, or even all development in Alta for that matter. Rather, their purported objective is to curtail further environmentally harmful development outside Alta's 1976 town boundaries. Line-drawing "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the lines. [That] the line might have been drawn differently at some points is" not a matter for judicial consideration. *Federal Communications Comm'n v. Beach*

Communications, Inc., 508 U.S. 307, 315-16 (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

B. Utah Equal Protection

Article I, § 24 of the Utah Constitution states: "All laws of a general nature shall have uniform operation." Utah Const. Art. I, § 24. Although this language is dissimilar to its federal counterpart, "these provisions embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984). "First, a law must apply equally to all persons within a class." *Id.* at 670. "Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute." *Id.* If the relationship of the classification to the objectives is unreasonable or fanciful, the disparate treatment is unreasonable. *Id.* We presume that the state acted on a reasonable basis. *Id.* at 671 n. 14. However, that presumption does not require us to accept any conceivable reason for the state action. *Id.* "Rather, we judge such enactments on the basis of reasonable or actual. . . purpose." *Id.* Additionally, a municipal corporation "does not have a legal duty to provide water service to all members of the public, ..." *Thompson v. Salt Lake City Corp.*, 724 P.2d 958, 959 (Utah 1986).

Alta consistently refused to extend its water lines outside its 1976 city limits without Salt Lake City's permission. Thus, Alta treats all persons in the class of property owners outside its 1976 city limits, including the

Haiks, the same. Furthermore, Alta's and Salt Lake City's actions were reasonable.

Therefore, we hold that Alta and Salt Lake City did not violate the Haiks' equal protection rights under either federal or state law.

II. Taking

The Haiks contend that the district court erred in determining no taking occurred even though they are completely unable to build on their lots. The Haiks assert that it is immaterial that Alta has not expressly prohibited building in the Albion Basin because by denying them a building permit for their lots without culinary water, Alta has deprived them of all viable economic use of their property. Additionally, the Haiks point out that a regulatory taking can exist even when no exaction has been demanded by the state and that it is immaterial that the applicable regulations and ordinances predated their ownership as a property owner can "come" to a taking.[4]

The Haiks brought their taking claim exclusively under Article I, § 22 of the Utah Constitution, which provides,

---

[4] The Haiks brought this claim solely against Alta. Therefore, we will not consider the Haiks' statements on appeal that, "No taking of the full economic use of the Haiks' property occurred until Salt Lake City denied its consent to extend water to them in 1996. In refusing to consent, Salt Lake City went beyond what the relevant background principles would dictate and hence worked a taking." (Brief for Appellants at 37) (internal quotation and citations omitted).

"Private property shall not be taken or damaged for public use without just compensation."[5] Utah Const. Art. I, § 22. "This provision is broader in its language than the similar provision in the Fifth Amendment of the United States Constitution." *Bagford v. Ephraim City,* 904 P.2d 1095, 1097 (Utah 1995). To recover, "a claimant must possess a protectable interest in property that is taken or damaged for a public use." *Id. See Farmers New World Life Ins. Co. v. Bountiful City,* 803 P.2d 1241, 1243-44 (Utah 1990); *Colman v. Utah State Land Bd,* 795 P.2d 622, 625 (Utah 1990). In *Colman,* the Utah Supreme Court observed:

> Many statutes and ordinances regulate what a property owner can do with and on the owner's property. Those regulations may have a significant impact on the utility or value of property, yet they generally do not require compensation under article I, section 22. Only when governmental action rises to the level of a taking or damage under article I, section 22 is the State required to pay compensation.

Coleman, 795 P.2d at 627. "[A] 'taking' is 'any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or

---

[5] Therefore, we will not consider the Haiks' appellate arguments that Alta's actions constitute a taking under the Fifth and Fourteenth Amendments to the United States Constitution. *See* Brief for Appellants at 32 ("The denial of a building permit to the Haiks constitutes a taking for which the Fifth and Fourteenth Amendments require just compensation, ..."); *id.* at 37.

destroyed.'" *Id.* at 626 (quoting *State ex tel., State Road Comm'n v. District Court, Fourth judicial Dist. in and for Utah County,* 78 P.2d 502, 506 (Utah 1937)).

The district court found that "[t]he Haiks still have in October 1997 what they purchased from Marvin Melville in October of 1994: lots in Albion Basin Subdivision # 1 with appurtenant water rights limited to 50 gallons per day per unit under the 1963 agreement. They retain the "full 'bundle' of property rights" they purchased." (Appellants' App. Vol. III at 875.) "[T]hey still lack the "one 'strand' of the bundle" that their predecessor in interest also did not have: a legal right to use water in an amount sufficient to satisfy the health department requirement of 400 gallons per day per unit." *Id.* at 876. The district court determined that "[t]he Haiks cannot build on their property, not because Alta or Salt Lake City have changed the rules, but rather because the rules remain the same." *Id.*

The Haiks cannot maintain a taking claim because they did not have a protectable interest in property that was taken or damaged by Alta's denial of a building permit. Alta's denial of a building permit was based on the health department requirement of 400 gallons of water per day per unit, which the Haiks did not meet. As the Court in *Coleman* pointed out, "'[m]any statutes and ordinances regulate what a property owner can do with and on the owner's property . . . yet they generally do not require compensation . . . ." *Coleman,* 795 P.2d at 627. This is but one of many such regulations. *See Smith Inv. Co. v. Sandy City,* 958 P.2d 245,253 (Utah Ct. App. 1998) ("If the ordinance and the state policies and reasons underlying it do, within reason, debatably promote the legitimate goals of increased public

health, safety, or general welfare, we must allow . . . legislative judgment to control."). Furthermore, mere expectation of municipal water service in the future is not a legal right that constitutes property subject to taking. *See Bagford,* 904 P.2d at 1099 (expectation of renewal of lease not property subject to taking). Therefore, we hold that no taking occurred under the Utah Constitution Article I, § 22.

AFFIRMED.

Entered for the Court:

James E. Barrett,
Senior United States
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

[Filed October 31, 1997]

Civil No. 2:96-cv-732J

RAYMOND A. HAIK; MARK C. HAIK,
Plaintiffs-Appellants,

v.

TOWN OF ALTA, a political subdivision of the State of Utah; SALT LAKE CITY CORPORATION, a political subdivision of the State of Utah,
Defendants-Appellees.

MEMORANDUM OPINION AND ORDER

Plaintiffs Raymond A. Haik and Mark C. Haik (Haiks") commenced this action to redress an alleged denial of equal protection of the law by the Town of Alta ("Alta"). The Haiks own unimproved parcels of land located within the Albion Basin and within Alta's municipal limits. They contend that Alta owes a legal duty to extend municipal water service to

their lots, notwithstanding the terms of the Water Supply Agreement between Alta and co-defendant Salt Lake City requiring Alta to obtain Salt Lake City's approval prior to extending additional water service to private landowners. Without municipal water service, the Haiks further assert, they are unable to obtain the building permits required to construct dwellings on their lots. If Alta's refusal to extend water service is somehow sustained, the Haiks contend that they are then entitled to just compensation for a "taking" of their property.

On November 27, 1996, plaintiffs filed a Motion for Partial Summary Judgment (dkt. no. 17). On January 22, 1997, defendants Alta and Salt Lake City filed their memoranda in opposition to plaintiffs' motion (dkt. nos. 19, 22), as well as their own cross motions for summary judgment (dkt. nos. 18, 21), accompanied by supporting affidavits (dkt. nos. 20, 23, 24). Alta also filed a motion to strike certain exhibits annexed to plaintiffs' motion papers as unauthenticated documents (dkt. no. 25). The Haiks filed their response/reply memoranda on March 19, 1997 (dkt. nos. 31, 32, 33), and on April 9, 1997, Alta and Salt Lake City filed their reply memoranda (dkt. nos. 34, 36), together with a supplemental affidavit (dkt. no. 35).

On April 25, 1997, these motions were heard by the court. At that time, the court requested the submission of additional data concerning water availability and took all motions under advisement. In the weeks thereafter, the parties filed a series of papers--submission and objections, reply and "sur-reply" (dkt. nos. 41, 42, 43, 44, 46, 50, 52).

Having reviewed the motions, memoranda, affidavits,

submissions, objections, replies and sur-replies, and having considered the arguments of counsel, the court now rules as follows:

Factual Background[1]

Albion Basin is located above the Alta and Snowbird ski resorts at the top of Little Cottonwood Canyon, east of Salt Lake City, and comprises part of the watershed relied upon by Salt Lake City and other Salt Lake Valley communities for their culinary water supply.

In 1963, Canyonlands, Inc., an apparent predecessor in interest to plaintiffs, entered into a contract with the Little Cottonwood Water Company which promised the availability of not more than 50 gallons per day to users in each of not more than 35 cabins to be constructed in the Albion Basin Subdivision #1.

Prior to 1971, land ownership in the Albion Basin was relatively free of county zoning regulations. In 1966, Salt Lake County had adopted a uniform zoning ordinance governing unincorporated areas of the county, and in November 1971, the county for the first time sought to limit building in the Albion Basin through an amendment to the 1966 ordinance. The amendment provided that no dwelling could be erected on less than fifty acres of land. This

---

[1] The parties' respective statements of facts recount this history in detail, supported by affidavits and buttressed by hundreds of pages of exhibits. The following offers only a brief summary of the stated facts.

amendment followed on the heels of applications for building permits that had been filed by Albion Basin Subdivision landowners who wished to construct four-plex housing units on their lots.

Marvin and Renee Melville, together with other Albion Basin Subdivision landowners, challenged the amendment in district court as being arbitrary, capricious, and unlawfully enacted. The first time around, the Melvilles prevailed; in 1975, the Utah Supreme Court struck down the 1971 amendment, holding that "when a zoning regulation is to be applied to unzoned land, it must be done after notice has been given four times by publication and not under the guise of an amendment." *Melville v. Salt Lake County,* 536 P.2d 133 (Utah 1975).

On August 4, 1975, Salt Lake County enacted another zoning ordinance, this one restricting construction in the Albion Basin to one single family cabin per subdivision lot. In May of 1976, a second trial was conducted in the *Melville* litigation on the plaintiffs' fourth cause of action seeking writs of mandamus compelling the issuance of building permits for the plaintiffs' proposed four-plex units. Plaintiffs did not prevail in the district court because they failed to show that any company or person, including Marvin Melville, had the right to use sufficient water in Little Cottonwood Canyon to supply the 400 gallons per day per unit that was required by the Salt Lake County Board of Health before a building permit could issue. On appeal, the Utah Supreme Court affirmed, concluding that "[a]t most plaintiffs have proved that they *may* have a right to 50 gallons of water per unit constructed, which does not meet the County Board of Health's requirement of 400 gallons per unit per day."

Melville v. Salt Lake County, 570 P.2d 687, 689 (Utah 1977) (emphasis in original).[2]

Meanwhile, on August 12, 1976, Salt Lake City entered into the INTERGOVERNMENTAL AGREEMENT--WATER SUPPLY AGREEMENT SALT LAKE CITY TO ALTA CITY ("Water Supply Agreement"). Reciting that Salt Lake City "owns and/or controls the major portion of the primary waters of Little Cottonwood Canyon for the use and benefit of Salt Lake City residents, some of which, at this time, can be made available to Alta," the Water Supply Agreement provides that Salt Lake City "agrees to make available to Alta for its use, as hereinafter described, the normal flow of raw, untreated water, not to exceed 265,000 gallons per day." *Id* at ¶1. Alta's "use, as hereinafter described," includes the following express limitation:

> 8. It is expressly understood and agreed that said pipelines shall not be extended

---

[2] The court also concluded that plaintiffs failed to show that they had lawfully appropriated the water flowing from a spring flowing from the portal of the old Alta-Helena Mine, located on Marvin Melville's Albion Basin property, and likewise failed to establish that they owned the spring waters as "percolating water" arising on the Melville property under *Riordan v. Westwood*, 115 Utah 215, 203 P.2d 922, 929, 930 (1949). The spring produced water at a rate of 20 gallons per minute, which a health department official testified was adequate to supply the proposed four-plexes with the required 400 gallons of water per unit per day. 570 P.2d at 688-89.

> to or supply water to any properties or facilities not within the present city limits of Alta without the prior written consent of [Salt Lake] City.

Id. at ¶8. It is uncontroverted that in 1976, Albion Basin Subdivision # 1 lay beyond the city limits of Alta. Moreover, the Water Supply Agreement recited that "Alta recognizes [Salt Lake] City's need to protect its watershed and specifically agrees to be bound by and comply with all City water ordinances, applicable County ordinances, Salt Lake City-County Board of Health regulations and applicable state law." *Id.* at ¶ 12. It also appears uncontroverted that in 1976, "applicable County ordinances' limited construction in the Albion Basin Subdivision # 1 to one single family cabin per subdivision lot, which the Board of Health required to be supplied with 400 gallons of water per day as a precondition to issuing a building permit.

Following the Utah Supreme Court's denial of the mandamus remedy in 1977, Marvin Melville made repeated requests to Salt Lake City for water to supply his Albion Basin property. Those requests were consistently refused, and it appears that Melville never succeeded in obtaining a building permit for his Albion Basin property or commencing construction of the proposed dwellings.

In 1981, Alta undertook to annex the Albion Basin Subdivision, which was accomplished by an August 20, 1981

resolution following a July 16, 1981 public hearing.[3] Thereafter, Alta conditioned issuance of building permits in the Albion Basin upon "approval of all uses, regardless of the size or number of units" given "in writing by the Salt Lake City-County Health Department, who shall certify as to the adequacy of the culinary water system and the sewage system." The approval of culinary water and sewer systems "shall be in accordance with the regulations of the Salt Lake City-County Health Department and the Utah State Division of Health." Town of Alta Uniform Zoning Ordinance, § 22-7-8(2) (1989).[4] The regulations referred to by the Alta ordinance continue to require the availability of 400 gallons of water per day per housing trait to be constructed. *See* Utah Admin. Code § R309-105-1 (1.2.6) (1997).

In 1983, Alta requested an amendment to the Water Supply Agreement, authorizing an extension of water service to the newly annexed Albion Basin properties. Salt Lake City, however, declined to consent to the proposed amendment. In 1988, however, Salt Lake City adopted a Watershed Management Plan and consented to Alta's use of water for snowmaking within Alta's city limits, which by 1988 included land within the Albion Basin area.

---

[3] Annexation was supported by, among others, Marvin Melville. *See* Affidavit of Mayor William H. Levitt, dated January 21, 1997 (dkt. no. 23), at ¶ 22. Melville now avers that he "agreed to the annexation on the belief that Alta would provide all city services to my property." Affidavit of Marvin Melville, dated March 5, 1997, at ¶ 5.

[4] Id at ¶ 26.

In 1988, Alta, Salt Lake City, and other government entities commenced discussion of acquiring private lands in the Albion Basin area for public use, and began developing acquisition strategies toward that end. Salt Lake City also entered into discussions with the Little Cottonwood Water Company in 1988 that culminated in Salt Lake City succeeding to the company's obligations under various water supply contracts, including the 1963 agreement affecting Albion Basin Subdivision #1, following the dissolution of the company in 1994.

In April 1991, the Salt Lake City Council adopted a Watershed Ordinance, § 17.04.020.A, B(1) of the Salt Lake city Ordinances, which, *inter alia,* prohibits the city from entering into any new water sales agreements or expanding any existing agreements, with three exceptions:

(a) water sales for residential use to property owners with a spring on the property;

(b) water sales to governmental entities for use on land they own or lease; or

(c) water sales for snowmaking and fire protection in certain cases.

In 1992, pursuant to the 1991 ordinance, Salt Lake City agreed to supply water to the U.S. Forest Service for recreational purposes at several locations, including the Albion Basin campground. In 1993, Salt Lake City gave consent to use of additional water for snowmaking by the Alta Ski Lifts Company. In 1995, Salt Lake City also consented to the extension of Alta's municipal water lines to an expanded

Alpenglow lodge facility, which purportedly falls within the 1976-city limits of Alta and therefore within the terms of the 1976 Water Supply Agreement.

In November, 1992, Alta prepared a General Plan for the Town of Alta. The General Plan identifies Albion Basin as a "high priority" area for the acquisition by Alta of privately-owned lands and recommends that "no future development be allowed in areas not served by a public sewer system," presumably including Albion Basin Subdivision #1. In September, 1994, Alta executed a Memorandum of Understanding with the U.S. Forest Service acknowledging that "a majority of the private land which exists in Albion Basin is presently undeveloped," that "development rights are affected by current laws and ordinances," and that "some properties lack water rights necessary for development," and endorsing "the public acquisition of land in the Albion Basin."

A month later, in October 1994, the Haiks stepped into this milieu by purchasing Lots 25, 26, 29 and 30 of Albion Basin Subdivision #l from Marvin Melville.

In a November 29, 1994 response to Raymond Haik's written inquiry concerning water and sewer services, Alta informed Haik that Alta does not provide water and sewer services to the Albion Basin Subdivision and referred him to the Salt Lake City Department of Public Utilities, Water Division. Upon inquiry by the Haiks, Salt Lake City in 1996 declined to consent to the extension of Alta water pipes and water supply to the Haiks' lots, relying on Paragraph 8 of the 1976 Water Supply Agreement and the 1991 Watershed Ordinance, § 17.04.020 of the Salt Lake City Ordinances.

In October, 1997, three years after their purchase, the Haiks continue to own Lots 25, 26, 29 and 30 of Albion Basin Subdivision #1, and continue to be unable to build on those lots because of the lack of culinary water supply that remains a legal prerequisite to the construction of dwellings on the property.

I. The Haiks' Equal Protection Claims Against Alta

As the Ninth Circuit pointed out in *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990),

> The interest in water for real estate development is not a fundamental right. *Bank of America Nat'l Trust and Savings Ass'n v. Summerland County Water Dist.*, 767 F.2d 544, 548 (9th Cir. 1985). Unless a classification trammels fundamental personal rights or implicates a suspect classification, to meet constitutional challenge the law in question needs only some rational relation to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511 (1976) . . . .
>
> However, the rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary . . . .

917 F.2d at 1155 (citation omitted). In this case, the Haiks contend that Alta, by refusing their requests to extend water service to the Haiks' Albion Basin properties, has acted in arbitrary and irrational fashion and has thereby denied the

Haiks equal protection of the laws. The Haiks' contention presupposes the existence of a legal duty on the part of Alta to supply water to property owners such as the Haiks, as well as the legal and physical capacity to do so.

A. The Municipal Duty to Supply Water

In Rose v. *Plymouth Town,* 110 Utah 358, 173 P.2d 285 (1946), the Utah Supreme Court held that mandamus did not lie to compel town authorities to extend their municipal water system to plaintiffs residence located within the town's geographical limits where such extension could be accomplished only at considerable expense. "Unless the town authorities are shown to have failed to exercise judgment or discretion such that a refusal to extend the water system would be unreasonable their decision is final." 173 P.2d at 287. In dictum, Chief Justice Larson observed,

> If this were a case where the town authorities had refused to connect the plaintiffs residence to a main already laid or if the plaintiff had financed the cost of the extension and agreed to accept water at the prescribed rates in payment therefor, the remedy might lie, because the writ would then be for the purpose of compelling the town to perform a duty, a ministerial act about which it would have no *discretion.* But such is not this suit. The effort here is to compel the extension of the water system a considerable distance under circumstances which call for reason and judgment and the exercise of discretion and are not ministerial.

Id. (emphasis added).

Child v. City of Spanish Fork, 538 P.2d 184 (Utah 1975), rejected a claim that a municipality's requirement that landowners in a newly annexed area convey shares of water in exchange for annexation was arbitrary, unreasonable, and a denial of equal protection. Agreeing with the district court that the requirement "represented prudence in planning for the City's needs," the Utah Supreme Court upheld the requirement as being wholly within the city's powers and not "in any degree unreasonable or arbitrary," and rejected plaintiffs' assertion that the city should fund the acquisition of additional water through a bond issue. 538 P.2d at 186-87. Rejecting the new annexees' claim of unequal treatment as compared to existing residents who made no conveyance of water rights, the court observed that "different treatment of individuals does not necessarily violate the equal protection of the laws assurances." Persons may be treated differently by the law "if the classifications have a reasonable relationship to a proper and lawful purpose, and if all persons within the same class are treated equally." *Id.* at 187. The *Child* court concluded that "the treatment of all of the plaintiffs as a class seeking annexation is for a proper and lawful purpose; and . . . all of the persons in that class are treated equally." *Id.*

Similarly, *Thompson v. Salt Lake City,* 724 P.2d 958 (Utah 1986), involved another effort to compel a municipality to provide water service. By ordinance, Salt Lake City conditioned water service upon agreement by the landowner to be responsible for payment for all water provided to his property. Lessees sued to obtain water service where their lessor refused to sign such an agreement, asserting that the city had a duty to provide water service and that the condition

requiring landowner agreement was "arbitrary, unreasonable, and discriminatory," and denied equal protection of the laws. Once again the Utah Supreme Court denied relief, holding that although they are authorized to provide water service, municipalities are not public utilities and do not "have a legal duty to provide water service to all members of the public . . . ." "The court upheld the ordinance on the grounds that (1) the ordinance tracked a state statute authorizing municipalities to require property owners to be responsible for payment for water service (*see* Utah Code Ann. § 10-7-10 (1973)); (2) the ordinance placed "all property, owners in the same class and treat[ed] them equally"; (3) the ordinance imposed the payment obligation on "the most logical and reasonable persons to bear that responsibility" and thus represented "the most effective means of insuring payment for water service"; and (4) the ordinance did not discriminate against tenants. "The ordinance therefore encompasses a legitimate purpose and objective and does not create an unconstitutional classification to achieve that objective." 724 P.2d at 959, 960.

At the outset, the Haiks acknowledge that, consistent with *Thompson,* Alta was not and is not designated as a public utility,[5] and "[h]ence, it does not have a legal duty to provide water service to all members of the public." *Thompson,* 724 P.2d at 959. Yet "[e]ven a municipality," the Haiks submit, "cannot arbitrarily choose to supply water to certain residents

---

[5] Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, filed November 26, 1996 (dkt. no. 15) ("Pltfs' Mem."), at 6.

while denying it to others."[6]

Rose, Thompson, and Child, the Haiks assert, "make clear that a municipality may refuse water service to residents for economic reasons. No such economic justification for refusing water service to the Haiks exists here, however." Pltfs' Reply/Opp. Mem. (Alta) at 10. The Haiks urge that they remain entirely willing and able to fund the extension of water lines to their property, thus eliminating the kind of economic impediment that justified municipal inaction in *Rose, Thompson, and Child.* "[W]here the Haiks have offered to pay the costs of the extension, and Alta has available sufficient water," the Haiks conclude, "Alta's obligation to provide water to the Haiks' lots is 'a ministerial act about which it [has] no discretion.'" Pltfs' Reply/Opp. Mem. (Alta) at 10-11 (quoting *Rose,* 173 P.2d at 287).

Yet it does not follow from *Rose, Thompson,* or *Child* that economic considerations are the *only* valid reasons that may justify declining to extend municipal water service to particular property. The Haiks' argument presupposes that "Alta has available sufficient water," which in this case turns on considerations of legal right and the exercise of lawful power.

While Utah law empowers municipalities to "construct, maintain and operate waterworks" by statute, *see*

---

[6] Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment, and Memorandum in Opposition to Defendants' Cross-Motions for Summary Judgment and Defendant Town of Alta's Motion to Strike, filed March 19, 1997 (dkt. no. 32) ("Pltfs' Reply/Opp. Mem. (Alta)'), at 9.

Utah Code Ann. § 10-8-14 (1996), a town does not gain any entitlement to ownership or use of any water simply by virtue of the town's existence. Counties, cities and towns have no "reserved right" to enough water to supply the needs of their constituents. Water to be supplied through a municipal water system must be acquired through lawful means as outlined in the statute. *See* Utah Code Ann. § 10-7-4 (1996); *Child,* 538 P.2d at 186 (consistent with the statute, a city may acquire water resources by purchase, lease, condemnation, gift, assignment, "or even by prescriptive use or easement").

Ownership of land, without more, likewise does not entitle a private landowner to use water that flows across, under or nearby that land. Instead, the Legislature decreed long ago that "[a]ll waters in this state, whether above or under the ground are hereby declared to be the property of the public . . . ." Utah Code Ann. § 73-1-1 (1989). As the Utah Supreme Court explained in the second *Melville* opinion, "No one owns or can own water in this state . . . . One can only acquire the right to use the water. One's right to use the water is measured by the amount he puts to beneficial use without interfering with another person's prior right to the use of the water." 570 P.2d at 688. In Utah, rights in land and rights to water arise separately and are legally distinct from each other. Ownership of one does not necessarily confer a right to the other. A municipality, like a private landowner, must acquire its water in the manner prescribed by law. *See Mt. Olivet Cem. Ass'n v. Salt Lake City,* 65 Utah 193, 235 P. 876, 879 (1925) (neither the city's ownership of land in Emigration Canyon nor its exercise of regulatory police power established proprietary right to use water).

B. Alta's "Capacity" to Supply Water

The waters of Little Cottonwood Canyon have been subject to extensive prior appropriation for years, indeed, for many years before the events concerning the Albion Basin transpired as recounted above. *See generally Little Cottonwood Water Co. v. Sandy City,* 123 Utah 242, 258 P.2d 440 (1953) (surface waters of Little Cottonwood Canyon fully appropriated; groundwater appropriation disputed as impairing surface water flow). Nothing in the Haiks' pleadings suggests that any unappropriated water remains available near Alta that Alta may now put to beneficial use by extending its water system to the Haiks' Albion Basin lots.[7]

At this point, Salt Lake City--not Alta--appears to hold all the cards where water in Little Cottonwood Canyon is concerned. Indeed, as successor to the Little Cottonwood Water Company, Salt Lake City even has control of the water (50 gallons per day) to be supplied to dwellings in the Albion Basin Subdivision #1 under the company's 1963 agreement.[8]

---

[7] Nor do the Haiks suggest the availability of any water that may be acquired by Alta through condemnation. It appears that Salt Lake City has acquired the water rights belonging to the former Little Cottonwood Water Co., which otherwise might have been acquired by Alta through eminent domain proceedings. *Cf. North Salt Lake v. St. Joseph Water & Irr. Co.,* 118 Utah 600, 223 P.2d 577 (1950) (municipality may acquire water rights by eminent domain from entity that provides public water service).

[8] Nothing in the present record suggests that Salt Lake City has forfeited any of its rights to water in Little Cottonwood Canyon for nonuse. See *Nephi City v. Hansen,* 779 P.2d at

Besides purchasing the Albion Basin lots from Marvin Melville, the Haiks stepped into Melville's shoes in another respect: notwithstanding the physical "availability" of sufficient water to support the construction of dwellings on their lots, they can establish no right under Utah's prior appropriation system of water rights that entitles either themselves or the Town of Alta to *use* that water for that purpose. Alta's "right" to use 265,000 gallons of water per day flows from its contractual agreement with that premier prior appropriator, Salt Lake City, who expressly conditioned Alta's right upon Salt Lake City's retained power to consent--or refuse to consent--to extensions of Alta's municipal water system beyond Alta's 1976 geographical limits.

It may be true that Alta has told others that it has "the *capacity* to supply water for 34 residential connections in addition to the approximately 190 connections it currently services," (Pltfs' Mem. at xii ¶ 45 (emphasis added)), but this physical capacity does not translate into the *legal* capacity--the right or power--to authorize or support such use, at least outside of Alta's 1976 geographical limits, because Alta's legal Capacity to supply water remains circumscribed at its source, the 1976 Water Supply Agreement.

In the first instance, then, Alta cannot supply water to the Haiks beyond that which is "available" under its 1976 Water Supply Agreement with Salt Lake City. Water is not available to the Haiks under the Water Supply Agreement absent Salt Lake City's consent to an extension of service

---

673,674-76 (Utah 1989) (city's nonconsumptive water rights forfeited where rights were "unused for about thirty years").

beyond Alta's 1976 limits. Where Salt Lake City withholds its consent, Alta has no legal right to extend water service to the Haiks.

II. Alta's 1981 Annexation of Albion Basin

The Haiks cite to Utah Code Ann. § 10-2-401(4), which states that as a matter of legislative policy, "areas annexed to municipalities in accordance with appropriate standards should receive the services provided by the annexing municipality . . . as soon as possible following the annexation," and to § 10-2-417(3), which provides that municipalities "shall not annex territory . . . without the ability and without the intent to benefit the annexed area by rendering municipal services in the annexed area."

Paragraphs 5 and 6 of Alta's July 16, 1981 Policy Declaration referred to the intended availability of police and fire protection, avalanche warning, sewer dump station and planning and zoning services. Yet the Policy Declaration makes no express commitment to extend Alta's water system to the Haiks' property or to supply water notwithstanding the terms of the Water Supply Agreement. Paragraph 7 of the Policy Declaration simply specifies that "[a]ny sewer and water improvements required by future development, according to the established policy of the Town," will be paid for by the owner or developer affected, taking into account the *possibility* of future water availability. Affidavit of Mayor William H. Levitt, dated January 21, 1997 (dkt. no. 23), at ¶ 20.

As far as § 10-2-41(3) is concerned, this plainly was not a case of annexation solely to generate revenue.

Anticipated revenue was minimal. The services referred to in the Policy Declaration were provided.[9] *Compare Chevron U.S.A., Inc. v. City of North Salt Lake,* 711 P.2d 228 (Utah 1985) (where it is uncontroverted that city annexed property solely to gain revenue with "no ability to render services that would benefit" the annexed property, annexation properly held unlawful under § 10-2-417(3)). Sections 10-2-401(4) and 10-2-417(3) do not specify *which* municipal services the annexing authority must have the ability and intent to provide for a lawful annexation to occur; nor does the balance of the Local Boundary Commissions Act, §§ 10-2-401 *et seq.*, expressly require that water or sewer services be furnished to all annexed property, or that municipalities act immediately to further the development of annexed areas.[10]

Apart from case and statutory authority, the Haiks point to no express contractual agreement with Alta, made either in the context of annexation or otherwise, entitling the Haiks to municipal water service. Instead, the Haiks assert that Alta "became obligated to provide water in the Albion

---

[9] In fact, Paragraph 6 of the Policy Declaration recited that "[t]he subject area has been serviced by the Town of Alta for several years by fire and police protection, avalanche warning, 911 emergency communications, library, and sewage disposal through the Town dump station."

[10] If anything, the Act appears to *restrict* development in newly annexed areas.' *See* Utah Code Ann. § 10-2-418 (1996); *Sweetwater Properties v. Town of Alta,* 622 P.2d 1178, 1181-82 (Utah 1981). However, the parties to this proceeding have not briefed or argued the question whether § 10-2-418 affected the Haik property in any way.

Basin by its own statements at the time of annexation." Pltfs' Reply/Opp. Mem. (Alta) at 11. According to the Haiks, the Mayor of Alta spoke of doing "everything possible to regularize the water supply in the basin," and that Alta would "try to work something out with the Water Department, as they actually have full control over the water in the canyon." *Id.* (quoting Pltfs' Exh. 11, at 2-3). "By such statements," the Haiks argue, "Alta convinced the property owners in the Albion Basin to favor annexation." *Id* at 12.[11]

The Haiks would now enforce these statements against Alta, apparently as a matter of promissory estoppel.[12]

---

[11] The Haiks also point to statements made when Mayor Levitt met privately with Albion Basin property owners, promising to do everything possible" to allow them to build. *Id.*

[12] Though the Haiks' do not invoke promissory estoppel by name, the arguments presented in their memoranda appear to track its essential elements. As *Anderson v. Aetna Casualty & Surety Co.*, 848 P.2d 171 (Utah Ct. App. 1993), explains:

> Promissory estoppel may be invoked in circumstances where" 'equity recognizes the unfairness of permitting withdrawal of the promise and will enforce it.'" *Tolboe,* 682 P.2d at 846 (quoting *Union Tank Car Co. v. Wheat Bros.*, 15 Utah 2d 101,387 P.2d 1000, 1003 (1964)). The necessary elements of promissory estoppel include: "(1) a *promise* reasonably expected to induce reliance; (2) *reasonable reliance* inducing action or forbearance on the part of the promisee or a third person; and (3) *detriment* to the promisee or third person.' *Weese v. Davis County Comm'n,* 834

However,

> Utah recognizes the general rule precluding a party from asserting estoppel against the government. *Utah State University v. Sutro & Co.*, 646 P.2d 715, 718 (Utah 1982). This rule safeguards the interests of the public which may be jeopardized by the "vagaries of political tides, frequent changes of public officials, the possibility of collusion, or of circumventing procedures set up by law, then suing for the value of goods furnished or services rendered." *Id.* Nonetheless, we

---

> P.2d 1, 4 n. 17 (Utah 1992) (emphasis added). Utah has also adopted the Restatement (Second) of Contracts section 90 describing promissory estoppel as follows: " 'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.' " *Tolboe*, 682 P.2d at 845 (quoting Restatement (Second) Contracts § 90(1) (1981)).

Id at 174-75 (quoting *Tolboe Constr. Co. v. Staker Paving & Constr. Co.*, 682 P.2d 843 (Utah 1984)). "Promissory estoppel is historically rooted as a substitute for consideration, *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 159 N E. 173, 57 A.L.R. 990, per Cardozo, C. J., citing 1 Williston on Contracts, Secs. 116, 139 . . . ." *Ravarino v. Price*, 123 Utah 559, 568, 260 P.2d 570, 575 (1953).

> recognize an exception to this general rule in unusual circumstances "when it is plainly apparent that its application would result in injustice, and there would be no substantial adverse effect on public policy ...." *Id.* The critical inquiry is "whether it appears that the facts may be found with such certainty, and the injustice to be suffered is of sufficient gravity, to invoke the exception." *Id.* at 720.

Prows v. State of Utah, 822 P.2d 764, 769 (Utah 1991).

Alta's 1981 Policy Declaration may itself have some binding force, but informal statements by the Mayor in the context of the annexation discussions do not operate as an amendment to that document adding water service to the services listed in Paragraph 5. "The policy declaration, including maps, may be amended from time to time *by the governing body after at least 20 days' notice and public hearing."* Utah Code Ann. § 10-2-414 (1996) (emphasis added). Nothing in the statute confers upon the Mayor the power to amend. Nor may the Mayor's "promise" be read into the Annexation Ordinance as a matter of "statutory construction." Pltfs' Reply/Opp. Mem. (Alta) at 13-14.

The Haiks have established no express legislative or contractual duty on the part of Alta to supply water to Albion Basin Subdivision #1. Alta cannot fairly be burdened with an implied legal duty to supply water that Alta has no legal right to use. Nor can it fairly be said that Alta has denied to any person the equal protection of its laws simply because it has failed to supply what it does not have the legal right to

supply.[13]

It is Salt Lake City, not Alta, that holds the right and exercises the power.

If a duty to supply water exists, that duty must devolve upon the entity with legal right to, and lawful control of the water that may be physically available to the Haiks' property--Salt Lake City.

III. Salt Lake City and "Prior Written Consent" to the Extension of Water Service

The Haiks assert no duty on the part of Salt Lake City to supply water to the Albion Basin property; Albion Basin lies beyond the Salt Lake City limits. While the statute provides that a city operating a waterworks "may sell and deliver the surplus product or service capacity of any such works, not required by the city or its inhabitants, to others beyond the limits of the city," Utah Code Ann. § 10-8-14(1), a city plainly is not required to do so.[14] In fact, the Haiks

---

[13] The general duty imposed upon municipalities by Article XI, § 6 of the Utah Constitution, *viz.*, that 'all such waterworks, water rights, and sources of water supply now owned or hereafter to be acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges,' presupposes that the water to be supplied to inhabitants has already been lawfully acquired by the municipality.

[14] Indeed, this provision may test the limits of Article XI, Section 6 of the Utah Constitution, which forbids a municipal

concede that as a matter of contract' Salt Lake City may refuse consent to an extension of water service by Alta pursuant to the Water Supply Agreement, at least so long as such refusal is "reasonable" and not "arbitrary" or "capricious."

The Haiks contend that they are entitled to test the reasonableness of Salt Lake City's refusal to consent as "taxpaying property owners of Alta," but should also be treated as "intended third-party beneficiaries of the Water Supply Agreement." Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment, and Response in Opposition to Salt Lake City's Cross-Motion for Summary Judgment, filed March 19, 1997 (dkt. no. 31) ("Pltfs' Reply Mem. (SLC)"), at 11. They acknowledge "the fight of Salt Lake City to exert some control over uses in the watershed," but deny its right to disallow "any new residential water use, no matter how environmentally sound" outside of Alta's 1976 limits. *Id.* at 19.

A. Implied Covenant of Good Faith and Fair Dealing

The Haiks assert that Salt Lake City's duty reasonably to give or refuse consent flows from the implied covenant of good faith and fair dealing, citing *Olympus Hills Shopping*

---

corporation to "directly or indirectly, lease, sell, or alien or dispose of any waterworks, water rights, or sources of water supply now, or hereafter to be owned by it . . . ." *See* generally Hyde Park Town v. Chambers, 99 Utah 118, 104 P.2d 220 (1939) (agreement granting tap rights in consideration for right-of-way held void under Utah Const., art. XI, § 6; dictum that "[i]f they have surplus water they may sell it within legal bounds," citing statute).

Ctr. Ltd v. Smith's Food and Drug Centers, Inc., 889 P.2d 445, 451 (Utah Ct. App. 1994), *cert. denied*, 899 P.2d 1231 (Utah 1995). *Olympus Hills* recognizes that "parties who retain express power or discretion under contract can exercise that power or discretion in such a way as to breach the covenant of good faith and fair dealing," as where a party "'uses its discretion for a reason outside of the contemplated range--a reason beyond the risks assumed by the party claiming a breach,'" or for a reason inconsistent with "the justified expectations of the other party." *Id.* at 450, 451 (quoting Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 385-86 (1980), and Restatement (Second) of Contracts § 205 cmt. a (1981)). However, the Haiks do not delineate how Salt Lake City has wrongfully exercised power or discretion under the Water Supply Agreement, either for a reason beyond the risks that Alta assumed in that agreement or for a reason inconsistent with Alta's 'justified expectations.', *See id.* at 451.

Instead, the Haiks assert that Salt Lake City's distinction between allowing water use within Alta's city limits under the Water Supply Agreement and refusing consent to its use outside of Alta's 1976 city limits is simply irrational. While Salt Lake City may rationally limit development in order to maintain and improve water quality, the Haiks concede, extending water and sewer service to their property would not defeat this policy, but rather would further Salt Lake City's watershed protection goals.

That the Haiks' preferred outcome may be reasonable or rational does not of necessity render the contrary outcome unreasonable or irrational. Circumstances often admit more

than one rational or reasonable result.

That Salt Lake City would refuse consent to extensions in order to limit developmental "sprawl" in the Albion Basin, as Salt Lake City avers it has done, does not indicate that it has wrongfully exercised power or discretion under the Water Supply Agreement, either for a reason beyond the risks that Alta assumed in that agreement or for a reason inconsistent with Alta's "justified expectations." Restriction of Alta's expansion of water service seems to be the clear import of Paragraph 8.

Paragraph 8 is phrased not in the affirmative language of grant ("Alta may extend its pipelines . . . as approved by Salt Lake City"), but in the negative language of limitation: "pipelines shall not be extended to or supply water to any properties or facilities not within the present city limits of Alta without the prior written consent of [Salt Lake] City." In essence, Paragraph 8 takes the extension of Alta's water pipelines beyond its 1976 limits out of the subject matter of the Water Supply Agreement and makes such extensions the subject of a future, separate agreement requiring Salt Lake City's prior assent in writing.

The Haiks' counsel have diligently sifted the contract law books in search of a rule that would compel Salt Lake City to give consent under Paragraph 8 of the Water Supply Agreement, but they have done so to no avail. The court concludes that the Haiks have failed to establish that Salt Lake City has breached any duty reasonably to give or refuse consent, whether under the implied covenant of good faith and fair dealing, or otherwise.

B. Equal Protection Claims Against Salt Lake City

The Haiks do not challenge the validity of Salt Lake City's 1988 Water Management Plan, its 1991 Watershed Ordinance, or even the 1976 Water Supply Agreement. Instead they assail "the irrational distinction Salt Lake City has drawn between uses inside Alta's 1976 Town limits . . . and uses outside" in refusing to consent to extension of water service under Paragraph 8 the Water Supply Agreement. Pltfs' Reply/Opp. Mem. (SLC) at 19. The Haiks contend that Salt Lake City's refusal to consent to water service violates the Haiks' right to equal protection under the law because it irrationally treats them differently from other similarly situated property owners. Allowing increased water use within the 1976 limits, the Haiks submit, threatens watershed degradation no less than increased water use outside those limits; where Salt Lake City allows one, in fairness it should allow the other, particularly where the amount of water already allocated for use by Alta under the 1976 Agreement would allow for such an extension.

The Haiks have recast their contractual "reasonableness" theory in constitutional terms. Their argument would also appear to recast Salt Lake City in the role of a local government furnishing water service to "similarly situated property owners," and whose conduct is to be scrutinized using the rational basis standard. *See Thompson v. Salt Lake City*, 724 P.2d at 959-60; *Bank of America Nat'l Trust v. Summerland County*, 767 F.2d 544, 548 (9th Cir. 1985).

Determining whether legislation survives rational-basis scrutiny is a two-step process. The first step is to identity a

legitimate government purpose the enacting governmental body could have been pursuing. The actual motivations of the legislators are unimportant, and the decision makers are not required to articulate a reason for their acts. The second step of the rational-basis inquiry is to determine whether a rational basis exists to believe that the legislation would further the hypothesized purpose. Here the inquiry is whether a conceivably rational basis exists, not whether that basis was actually considered by the legislative body.

As noted above, however, Salt Lake City has no legal duty to furnish water to users outside its own city limits, be they "similarly situated" or not. As an owner of water rights, Salt Lake City's role in this instance is proprietary rather than administrative. The equal protection yardstick is simply not available to measure Salt Lake City's exercise of its contractual power to consent pursuant to Paragraph 8 of the Water Supply Agreement.[15]

IV. "Taking" of the Haiks' Albion Basin Property

Alta also moved for summary judgment on the Haiks'

---

[15] Moreover, even if subject to rational basis scrutiny, Salt Lake City responds that limiting development outside Alta's 1976 limits was accomplished "for the very purpose of preventing development over a dispersed area, since dispersed development has a greater detrimental impact on water quality,' thus furnishing a rational basis for the distinction challenged by the Haiks. Reply Memorandum in Support of Defendant Salt Lake City's Cross Motion for Summary Judgment, filed April 9, 1997, at 19. While the Haiks dispute this rationale, they have not shown it to be arbitrary or capricious, or for that matter, unreasonable.

claim that their Albion Basin property has been the subject of "taking" without payment of just compensation.[16] The Haiks assert that development of their Albion Basin "was not foreclosed to the Haiks until after they had purchased the land in 1994," when Alta "refused to extend water or sewer to their lots in spite of the Haiks' willingness to pay for that extension," and consequently denied them a building permit. Pltfs' Reply/Opp. Mem. (Alta) at 24. "These actions," the Haiks argue, "constitute a taking." *Id.*

Governmental land use regulation may, under extreme circumstances, amount to a "taking" of the affected private property which entitles the property owner to just compensation under the United States and Utah Constitutions. *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121,126 (1985). To prevail on their taking claim, the Haiks must show that Alta's actions (1) did not substantially advance a legitimate public purpose; or (2) denied it economically viable use of its property. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016 (1992); *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834 (1987). The fact that a regulation deprives the property owner of *the most profitable use* of his property does not necessarily accomplish a taking or establish the owner's right to just compensation. *See Andrus v. Allard*, 444 U.S. 51, 66 (1979).

In *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987), cited by the

---

[16] The Haiks appear to make a Rule 56 cross motion on this claim for the first time in their reply memorandum. *See* Pltfs' Reply/Opp. Mem. (Alta) at 23 n.13.

Haiks, the county adopted an ordinance expressly forbidding construction or reconstruction of buildings on canyon property that had been ravaged first by fire, then by flood, and then designated as an "interim flood protection area." *Id.* at 307. The Court held that "where the government's activities have already worked a taking of *all use of property,* no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321 (emphasis added). Here, Alta has adopted no express prohibition against building in the Albion Basin. Nor do the Haiks suggest that Alta's conditioning of issuance of building permits upon the availability of 400 gallons of water per day per unit amounts to a "taking" of all use of their property because it does not advance a legitimate public policy or unfairly forestalls any reasonable development. *Compare Del Monte Dunes at Monterey v. City of Monterey, 95* F.3d 1422, 1434 (9th Cir. 1996).

In *Nollan v. California Coastal Commission*, the governmental entity conditioned the issuance of a building permit upon the landowners' surrender of an easement to the public across their beachfront property. The Court concluded in *Nollan* that if the governmental entity "wants an easement across the Nollans' property, it must pay for it." 483 U.S. at 842. Here, Alta has asked to Haiks to transfer, convey, or surrender nothing.

The Haiks still have in October of 1997 what they purchased from Marvin Melville in October of 1994: lots in Albion Basin Subdivision #1 with appurtenant water rights limited to 50 gallons per day per unit under the 1963 agreement. They retain the "full 'bundle' of property rights"

they purchased. *Andrus,* 444 U.S. at 66. And notwithstanding the Haiks' assertion that at the time of annexation, "Albion Basin property owners had a right to expect that they would be able to build homes on their land," Pltfs' Reply/Opp. Mem. (Alta) at 24,[17] they still lack the "one 'strand' of the bundle" that their predecessor in interest also did not have: a legal right to use water in an amount sufficient to satisfy the health department requirement of 400 gallons per day per unit. The Haiks cannot build on their property, not because Alta or Salt Lake City have changed the rules, but rather because the rules remain the same.

The right to *use* real property, as part of the constitutional right to "property" protected by the Fifth and Fourteenth Amendments, does not carry with it a corollary right to use water already put to other beneficial use by a prior appropriator. Nor does such a right obtain upon annexation in the form of an entitlement to "municipal services." Otherwise, state and local governments in the arid West could conceivably be held to have "taken" all lands for which no unappropriated water exists to be supplied through state, county or city systems.

In *Lockary v. Kayfetz,* 917 F.2d 1150 (9th Cir. 1990), owners of undeveloped land who had been refused water hookups by a local public utility district sought compensation for the taking of their property because the lack of water

---

[17] The Supreme Court has suggested that where an owner is denied only some economically viable uses, a taking still may have occurred where government action has a sufficient economic impact and interferes with distinct investment-backed expectations. *See Lucas,* 505 U.S. at 1019-20 n.8.

hookups made them ineligible for county building permits and denied them all economically viable use of their land. Reversing summary judgment in favor of the utility district, the Ninth Circuit observed:

> Withholding *available* water from land zoned exclusively for residential use might interfere with the landowners' reasonable investment-backed expectations by preventing all practical use of that land . . . . That the [plaintiffs] can still walk on, or ride a bike on, or look at their land does not, at this preliminary stage of the case, reassure us to the contrary. In this context, assuming that the [plaintiffs] *can show that sufficient water was available,* then BCPUD's water moratorium may indeed constitute more than a mere reduction in property value. *Cf. Trustees for Alaska v. E.P.A.*, 749 F.2d 549, 560 (9th Cir. 1984) (mere reduction in property value does not establish a denial of all economically viable use of property).

917 F.2d at 1155 (emphasis added & citation omitted). To establish a taking of their property, the landowners in *Lockary* were thus required to establish first that sufficient water was *available* to be furnished through the utility district hookups they requested.

Here, it appears from the record that neither the Haiks nor the Town of Alta have available the water necessary to make an "economically viable use" of the Albion Basin property through construction of residential dwellings. While

Alta has rights under the Water Supply Agreement to more water than it currently uses, that water is not legally "available" outside Alta's 1976 limits without the consent of the proprietor, Salt Lake City. As the Ninth Circuit acknowledged in *Lockary,* if the loss of economic viability of property "is caused by something other than the government regulation, it does not constitute a taking." 917 F.2d at 1155 (citing *Bedford v. United States,* 192 U.S. 217, 225 (1904)). On the present record, it appears that the Haiks' taking claim also fails as a matter of law.

V. Defendants' Motion to Strike Certain Exhibits

Alta also filed a motion to strike certain of the Haiks' exhibits[18] as, *inter alia,* not properly authenticated for purposes of Rule 56. Salt Lake City joined Alta's motion by footnote. *See* Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant Salt Lake City's Cross-Motion for Summary Judgment, filed January 22, 1997 (dkt. no. 19), at 7 n.2.[19] The Haiks respond that the challenged documents were obtained pursuant to Utah Code Ann. § 63-2-102 from the defendants' own files and that them exist *sufficient* indicia of authenticity to render the exhibits admissible even at trial. Pltfs' Reply/Opp. Mem.

---

[18] Specifically, Alta objects to Exhibits 6, 16, 17, 24, 26, 27, 31, 40 and 42 to the Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment.

[19] While Salt Lake City points to plaintiffs' Exhibits 14, 17, 23, 27, and 40 as having disputed authenticity, Alta's motion to strike did not address Exhibits 14 and 23 and are not encompassed within Salt Lake City's joinder in that motion.

(Alta) at 1-8.

Generally, under Rule 56 the moving party must adduce admissible evidence to demonstrate that there are no genuine *issues* of material fact which preclude entry of summary judgment, for it is clear that "only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment." *Beyene v. Coleman Security Systems Services, Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). *Accord, Hall v. Bellmon*, 935 F.2d 1106 (10th Cir. 1991); *Jones v. Wilkinson*, 800 F.2d 989, 1002 (10th Cir. 1986) ("Fed. R. Civ. P. 56. . . requires that material supporting a motion for summary judgment be admissible evidence"); *World of Sleep, Inc. v. Lay-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985) ("Under Fed. R.Civ. P. 56(e), the court may consider only admissible evidence in ruling on a motion for summary judgment."); *H.B. Zachry Co. v. O'Brien*, 378 F.2d 423, 425 (10th Cir. 1967).

> A moving party may. . . supplement the motion with affidavits, pleadings, deposition transcripts, interrogatory answers, admissions, stipulations, transcripts from another proceeding, oral testimony, *authenticated exhibits*, and anything of which the court may properly take judicial notice. To be considered, the facts contained in these materials must be admissible or usable at trial, although for purposes of summary judgment, the facts need not be presented to the court in a form admissible at trial.

Steven Baicker-McKee, et al., *Federal Civil Rules Handbook* 600 (1997 ed.) (emphasis added & footnote omitted).

Rule 56(e) expressly requires that summary judgment affidavits "set forth-such facts as would be admissible in evidence . . . ." The same principles apply to deposition testimony and other forms of evidence approved for use on summary judgment by Rule 56(c). *See Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49 (lst Cir. 1990); *Klein v. Trustees of Indiana University*, 766 F.2d 275,283 (7th Cir. 1985) ("the party opposing the summary judgment motion must present affidavits, depositions, answers to interrogatories, or admissions which set forth disputed facts in a form admissible in evidence.") 762 F.2d 952); *Clay v. Equifax, Inc.*, 762 F.2d 952, 956 (1 lth Cir. 1985). As the court observed in *Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985): "The facts must be established through one of the vehicles designed to ensure reliability and veracity-depositions, answers to interrogatories, admissions and affidavits. When a party seeks to offer evidence through other exhibits, they must be identified by affidavit or otherwise made admissible in evidence. 6 Moore's Federal Practice P 56.11 [1.-8] (2d ed. 1983)." *See also Singer v. Wadman*, 595 F. Supp. 188, 269 (D. Utah) (Winder, J.). Only deposition testimony that in substance would be admissible in evidence at trial may be introduced on a summary judgment motion. *Skillsky v. Lucky Stores, Inc.*, 893 F.2d 1088, 1091 (9th Cir. 1990) (deposition testimony that is not based on personal knowledge and is hearsay is inadmissible and cannot raise a genuine issue of material fact sufficient to withstand summary judgment); *Jacobsen v. Filler*, 790 F.2d 1362, 1367 (9th Cir. 1986).

The Haiks may be correct that when examined, each of the challenged exhibits would prove to be authentic.[20] Nevertheless, as moving parties under Rule 56, the Haiks are bound to abide by the rule's requirements concerning the admissibility of Rule 56(c) materials. For that reason, the defendants' motion to strike plaintiffs' Exhibits 6, 16, 17, 24, 26, 27, 31, 40 and 42 should be granted.[21]

Conclusion

The Haiks have failed to show that they are entitled to judgment as a matter of law that the Town of Alta, by declining to extend its water service to the Haiks' Albion Basin property, has denied them equal protection of the laws, or breached any other asserted statutory or contractual duty to

---

[20] However, as a general role, newspaper articles *(e.g.*, Exhibit 40) are not admissible for purposes of summary judgment *See, e.g., Horta v. Sullivan*, 4 F.3d 2, 8 (lst Cir. 1993) (court refused to consider hearsay newspaper account in exhibit form and asserted that "inadmissible evidence may not be considered'); *Dowdell v. Chapman*, 930 F.Supp. 533, 541 (M.D. Ala. 1996) *Tilton v. Capital Cities/ABC, Inc.*, 905 F.Supp. 1514, 1544 (N.D. Okla. 1995) (a "newspaper article is not proper evidence for submission on summary judgment as it is inadmissible hearsay"). (. . . continued)

[21] The Haiks requested a continuance should "the Court determine[] that the challenged exhibits must be struck, and that without them it must deny the plaintiffs' Motion for Summary Judgment." Plffs' Reply/Opp. Mem. (Alta) at 8. It appears, however, that the exhibits in question are not material to the issues that the Court has determined to be dispositive, and a continuance to permit authentication of the exhibits appears unnecessary.

furnish culinary water. The Haiks likewise have failed to establish a breach of any contractual or other legal duty on the part of Salt Lake City to approve the extension of Alta's water lines to serve the Haiks' property. The parties having established the absence of any genuine issue of material fact, it now appears that the Town of Alta and Salt Lake City are each entitled to judgment as a matter of law on the Haiks' pleaded claims. Therefore,

IT IS ORDERED that plaintiffs' motion for partial summary judgment is DENIED; that defendant Town of Alta's motion for summary judgment is GRANTED; that the Town of Alta's motion to strike is GRANTED; and that Salt Lake City's motion for summary judgment is GRANTED, and plaintiffs' complaint shall be and hereby is DISMISSED.

DATED this 31 day of October, 1997.

BY THE COURT:
/s/_____
Bruce S. Jenkins
United States Senior District Judge

District Court Memorandum Opinion & Order

United States District Court
for the
District of Utah
November 4 1997

** MAILING CERTIFICATE OF CLERK **

Re: 2:96-cv-00732

True and correct copies of the attached were mailed by the clerk to the following:

Mr. Stephen G. Crockett, Esq.
GIAUQUE CROCKETT BENDINGER & PETERSON
170 S MAIN STE 400
SALT LAKE CITY, UT 84101-1664
FAX 9,5311486

Mr. Craig V Wentz, Esq.
CHRISTENSEN & JENSEN
175 S WEST TEMPLE STE 510
SALT LAKE CITY, UT 84101

Mr. Paul D Veasy, Esq.
PARSONS BEHLE & LATIMER
201 S MAIN ST STE 1800
PO BOX 45898
SALT LAKE CITY, UT 84111-0898
FAX 9,5366111

Mr. Steven W. Allred, Esq.
SALT LAKE CITY ATTORNEYS OFFICE
451 S STATE ST STE 505
SALT LAKE CITY, UT 84111
FAX 9,5357640

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DIVISION FOR THE
DISTRICT OF UTAH

[Filed November 6, 1997]

Case Number: 2:96cv732J

Raymond and Mark Haik	)
	)
v.	)
	)
Town of Alta et al	)
	)

JUDGMENT IN A CIVIL CASE

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment be entered in favor of the defendants and plaintiff's cause of action is dismissed.

Date: November 6, 1997

Clerk: Markus B. Zimmer

/s/_____
(By) Deputy Clerk

Entered on docket
11/7/97 by:
cc
Deputy Clerk

United States District Court
for the
District of Utah
November 7, 1997

* * MAILING CERTIFICATE OF CLERK * *
Re: 2:96-cv-00732

True and correct copies of the attached were mailed by the clerk to the following:

Mr. Stephen G. Crockett, Esq.
GIAUQUE CROCKETT BENDINGER & PETERSON
170 S MAIN STE 400
SALT LAKE CITY, UT 84101-1664
FAX 9,5311486

Mr. Steven W. Allred, Esq.
SALT LAKE CITY ATTORNEYS OFFICE
451 S STATE ST STE 505
SALT LAKE CITY, UT 84111
FAX 9,5357640

Mr. Craig V Wentz, Esq.
CHRISTENSEN & JENSEN
175 S WEST TEMPLE STE 510
SALT LAKE CITY, UT 84101

Mr. Paul D Veasy, Esq.
PARSONS BEHLE & LATIMER
201 S MAIN ST STE 1800
PO BOX 45898
SALT LAKE CITY, UT 84111-0898
FAX 9,5366111

APPENDIX D

SALT LAKE CITY ORDINANCE
No. 23 of 1991
(Canyon Water Sales Ordinance)

AN ORDINANCE AMENDING AND RESTATING ARTICLE I OF CHAPTER 4 OF TITLE 17 AND ENACTING ARTICLE VII OF CHAPTER 4 OF TITLE 17 OF THE SALT LAKE CITY CODE, RELATING TO THE NEW CANYON WATER SALES ORDINANCE.

Be it ordained by the City Council of Salt Lake City, Utah:

SECTION 1. That Article I of Chapter 4 of Title 17 of the Salt Lake City Code be amended and restated, and Chapter 4 of Title 17 of the Salt Lake City Code be amended by adding thereto a new Article VII, relating to the new canyon water sales ordinance, as follows:

Chapter 17.04 Watershed areas

Article I. General Provisions and Permits

17.04.010 Definitions.

For the purpose of this chapter, the following terms, phrases and words shall have the meanings set forth in this section:

A. "Limiting distance" means the distance by horizontal measurement.

B. "Reservoir" means any natural or artificial lake or pond.

C. "Watercourse" means aqueducts, pipelines, natural or artificial streams or channels through or in which water at any time flows.

D. "Watershed area" means the entire area in any canyon above the intake of the city within which water drains into any stream or tributary thereof or any artesian or flowing well basin, where such waters are taken by the city into its waterworks system for the culinary and domestic use of the inhabitants thereof.

E. "Approved spring" is a naturally occurring spring which:

> 1. produces each day an amount of water equal to the minimum quantity and quality of water required by State law, Salt Lake County and the Salt Lake City ordinances, and Salt Lake City-County Health Department regulations for a residence within the watershed area.
>
> 2. produces water which at all times meets at least the minimum health standards of State and Salt Lake City-County Health Department regulations,

3. produces less than 100 gallons of water per minute during the period between September 15 and October 1.

4. is not a watercourse or a tunnel, mine shaft, well or any other artificial structure.

5. the Department of Public Utilities finds that the development of the spring will not have substantial adverse effect upon wetlands created by such spring or the riparian zone below such spring.

6. the Department of Public Utilities finds that the development of the spring will not cause any degradation of water quality under federal, State, County and City laws and regulations.

F. "Residence" is a single family dwelling.

G. "Well" shall mean any artificially made pipe, shaft or hole sunk into the earth below the ground surface into a water bearing strata from which water may be taken.

17.04.020 Preamble -- Permit required for water use--Conditions.

PREAMBLE: Beginning in 1888, the City acquired extensive water rights to Wasatch Canyon stream flows through Exchange Agreements with irrigation companies and control over the City's watersheds through State and Federal

legislation. Under State law, the City can only sell its surplus water outside the City's limits. The City has determined that except for snowmaking, fire protection and water from possible canyon springs it does not have surplus water for sale in its watershed canyons. This determination is based upon the following: canyon waters are extremely valuable to the City because they are the City's closest high quality water supplies; water from canyon streams can be delivered to most City customers by gravity flow without pumping; and water used for snowmaking affords a degree of storage as it is usually the last to melt. Additionally, the City has made major capital expenditures for facilities to treat water coming from the canyons and they operate most economically when they have greater quantities of water to treat. Also, controlling issuance of new permits for water supply in the watershed area hereunder is consistent with the City's 1989 Watershed Management Plan for the protection of the City's watersheds.

A. No permits issued prior to enactment of this ordinance may be amended except as to the sources of the water supply. No permit shall be amended to enlarge the service boundary or increase the water supply.

B. No new use of Salt Lake City water in the watershed areas of the city within Salt Lake County shall be made by any individual whomsoever without such person first obtaining a permit for such water use from the city. Subject to the other terms of this chapter, a permit may be issued on an interruptible basis only to:

(1) the owner, or lessee where the owner is a governmental entity, of property in a watershed area for the purpose of supplying

water from an approved spring for a residence located on such property.

(2) the owner, or lessee, where the owner is a government entity, of property in a watershed area for snowmaking or fire protection.

(3) the federal government, the State of Utah or a-political subdivision thereof for the purpose of supplying water for use on property owned or leased for use by such governmental entity.

C. The City shall not be required to issue a permit in any case, but may do so in its sole discretion as provided above. The City may include in any permit conditions for spring development or use.

D. All permittees take water at their own risk where the source of supply is other than treated water from the regular city pipeline system, and all permits issued shall so state.

E. When the approved spring which an applicant desires to use is a spring which is already being used under a permit from the city, the city shall not issue a new permit unless (1) utilization of the water from such spring by the Applicant will not interfere with the supply to the other then existing permittees using such approved spring, (2) the then existing permittees using such approved spring who own a water system shall approve of such new connection to their system, except for the spring box or other spring capturing

device, and (3) the existing permit shall be amended in a manner satisfactory to the then existing permittees and the City to take into account required conditions (1) and (2). The City retains the right to authorize a tap or connection for a new permittee to any spring box or other spring capturing device.

F. An applicant for a permit may be required by the city to supply as part of the application an environmental report with respect to the proposed water system.

G. Any change application required to be filed with the state engineer for the use of the water from an approved spring shall be filed by the permittee only with the city's prior written approval in the city's name at the permittee's sole expense.

H. The geographic area served pursuant to an issued permit shall not be expanded beyond the original geographic area which is to be served under the permit on the date it is issued.

17.04.030 Charges for use of water.

The policies rates or fees for sale of surplus water in the watershed area shall be recommended by the City's Public Utilities Advisory Committee and approved by the Director of Public Utilities. All said policies, rates or fees are subject to review and approval of the City Mayor and Council. Such rates shall not exceed the City's special county water rates.

17.04.040 Permit--Rights permissive only.

A. All permits issued pursuant to the provisions of this chapter shall be deemed to give permissive rights to the use of water only and such use shall be permitted only during periods when the city has surplus water for sale. Such permits shall be subject to immediate suspension or revocation when the city in its sole judgment determines that surplus water is no longer available from the city sources of supply.

B. Except as otherwise provided above, permits shall have original terms of no more than 30 years and be renewable only upon such terms as the city shall determine in its sole discretion.

17.040.50 Easements and service connections.

An applicant for a permit must supply satisfactory evidence that the applicant will be able to provide at applicant's sole expense all easements necessary for the transportation of water from the approved spring to the point where it is to be used. All permittees shall make and maintain connections at their sole expense and shall construct and maintain at their sole expense any and all water lines, spring boxes, valves, etc., necessary to supply culinary water to their premises. All connections and appurtenances, both as to materials used and method of construction, shall be subject to the approval of the city.

17.04.060 Permit--Revocation conditions.

All permits issued pursuant to the provisions of this chapter shall be subject to revocation by the public utilities director, or health director, subject to review by the mayor. Permits may be revoked for any of the following causes:

A. Nonpayment of water bills;

B. Violation of any of the sanitary regulations now existing or which may hereafter be enacted pertaining to the watershed area by permittee or any of the permittee's family, licensees or agents;

C. Waste of water due to any cause not immediately remedied by permittee;

D. Use of any purpose other than culinary purposes, i.e., the ordinary within the residence household activities;

E. Violation of this ordinance or any condition specified in a permit;

F. The City has no surplus water; and

G. Any other cause deemed necessary by the public utilities director or health director to protect the safety, health and welfare of the inhabitants of the city.

17.04.065 Exchange of Water Rights.

The city shall not be precluded from making agreements for the exchange of water rights within the city's watershed, or to resolve disputes involving existing water rights or alleged water rights, if the city determines that to do so is in the city's best interest.

Article VII. Appropriations of Water

17.04.530 Applications for Appropriations of Water--Protests.

It is the City's general policy to file a protest with the state engineer with respect to any application which is inconsistent with this chapter or with respect to a use for which no permit has been issued pursuant to this chapter, including without limitation changes in place of diversion, purpose of use, importation of water from other watersheds, drilling of wells, and transfer of water rights into watershed areas; provided, however, that the City's Director of Public Utilities and the City Attorney shall determine whether to file such a protest in any particular case.

SECTION 2. This Ordinance shall take effect on the date of its first publication.

Passed by the City Council of Salt Lake City, Utah, this 9th day of April, 1991.

/s/_____
CHAIRPERSON

ATTEST:

/s/_____
CITY RECORDER

Transmitted to the Mayor on _____
Mayor's Action: ___X___ Approved _____ Vetoed

/s/_____
MAYOR

ATTEST:

/s/_____
CITY RECORDER

RLM:cc
3/1/91

Bill No. 23 of 1991
Published 4-22-91

APPENDIX E

ORDINANCE NO. ____
POLICY DECLARATION OF
THE TOWN OF ALTA

WHEREAS, the Town Council heretofore resolved to propose the adoption by the Town of Alta of a Policy Declaration pursuant to the provisions of Section 10-2-414, Utah Code Annotated (1953), as amended; and

WHEREAS, the Town of Alta scheduled a public hearing on said proposal for 10:00 o'clock A.M. on July 16, 1981, at the Alta Community Center in Alta, Utah, and gave and published notice thereof, all as required by the provisions of Section 10-2-414, Utah Code Annotated (1953), as amended; and

WHEREAS, the Town Council of Alta conducted the public hearing as scheduled on July 16, 1981, at the time and place scheduled;

NOW, THEREFORE, BE IT ORDAINED by the Town Council of Alta that the "Policy Declaration" proposed, as provided by and pursuant to the provisions of Section 10-2-414, Utah Code Annotated (1953), as amended, be and the same is hereby adopted and approved with respect to the area herein referred to and as delineated on the attached map.

POLICY DECLARATION

WHEREAS, the Town of Alta (hereinafter the "Town") is a duly constituted municipality under the laws of the State of Utah, having its situs in Little Cottonwood Canyon, Salt Lake County, State of Utah; and

WHEREAS, the State of Utah has enacted certain legislation which provides that a municipality, prior to annexation of any territories outside its corporate limits, must adopt a policy declaration stating its willingness to annex said property; and

WHEREAS, the unique environment of the Little Cottonwood Canyon area, both in its use as a recreational area and in its use as the major watershed area requires that all urban development be carefully planned and constructed so that the delicate balance of nature can be protected and preserved; and

WHEREAS, the nature of the Canyon area necessitates that all urban development must occur within the established municipalities in order that the essential municipal services may be provided in such a way as to minimize the damage to the environment, as well as maximize the protection of the health, safety and welfare of the residents of the Canyon area and the Salt Lake Valley; and

WHEREAS, the Town of Alta wishes to encourage development within municipal boundaries rather than allowing urban development on the periphery of said municipality;

1. Declaration of Policy. The Town of Alta hereby

declares that the urban development of any of the properties which lie adjacent to the Town of Alta, as described on the attached map (Exhibit "A") would severely impact the Town and that it would be in the best interests of the residents of the Town, as well as the owners, developers and ultimate users of said adjacent properties if such area, all of which lies contiguous to the corporate limits of the Town, as shown on Exhibit "A", were annexed to the Town. The Town hereby adopts a policy favoring the extension of its boundaries so as to include the area designated on Exhibit "A" and herewith announce its willingness to do so, according to the procedures set forth in Section 10-2-401, et seq., Utah Code Annotated (1953), as amended.

2. Criteria for Annexation. The Town further declares that such annexation must be according to the procedures for annexation established by the ordinances of the Town, to wit: that all annexations must be reviewed by a public hearing before official Town Council action is taken.

In addition, the Town of Alta favors annexation of the area designated in exhibit "A" (or portions thereof) only upon the following criteria:

> (a) That this area has been determined to be an island or peninsula, since access to the area is completely cut off by the Town of Alta and said area cannot be serviced except through the Town of Alta because of geographic and other limitations. The area is surrounded by more than two (2) sides by the Town of Alta and the remaining boundary is determined to be the ridge line in the Canyon.

(b) That the area presently undeveloped would be master planned in keeping with the rules and regulations of the Town of Alta, with all rights and privileges enjoyed by the Town of Alta.

3. Annexation Standards. With respect to the annexation standards set forth in Section 10-2-401, et seq., Utah Code Annotated (1953), as amended, the Town declares as follows:

(a) The property here favored for annexation is contiguous to the Town.

(b) The property lies within the area projected for municipal expansion under this Policy Declaration.

(c) The property is not presently within the boundaries of another incorporated municipality.

(d) Such annexation will not created an unincorporated "island" as that term is defined.

(e) Such property presently contains no urban development, as that term is defined in Section 10-2-104, Utah Code Annotated (1953), as amended. Therefore, the favored annexation would not result in a loss of revenues to Salt Lake County greater that the costs of services now being provided by Salt

Lake County, which costs would be assumed by the Town of Alta.

(f) That such favored annexation is not and would not be for the sole purpose of increasing revenues to the Town.

4. Character of Community. The Town states that its boundaries lie within an area of the county which supports a unique and sensitive environmental balance. It is the policy of the Town to foster and enhance the beneficial existence of development and nature. Such requires careful growth and improvement. Because of the nature of the location of the Town, it is subjected to unusual problems with respect to avalanche control and the protection of the people from avalanche danger, as well as traffic control problems and uninhibited passage on the road that would service this area. These problems include snow removal and the control of parking.

The character of the community is residential and mountain recreational, with attendant service-related businesses. The community and the surrounding communities in the unincorporated territory which the Town favors annexing, require the delivery of intense, high quality, cost-effective municipal-type services.

5. Timetable. All of the municipal services described above shall be available to the territory set forth in Exhibit "A" immediately upon annexation. Increased police patrols and fire prevention efforts will occur following annexation finalization. Sewer services, as described above, shall be provided as such area is developed. The existing sewer

facilities are, or can be made, adequate to provide services to the annexed territory.

The subject area has been serviced by the Town of Alta for several years by fire and police protection, avalanche warning, 911 emergency communications, library, and sewage disposal through the Town dump station.

7. Financing of Services. All services above-described are financed, and would be financed, through appropriations from the general fund. Any sewer and water improvements required by future development, according to the established policy of the Town, are financed wholly from the funds of the affected developer or owner, through connection and development fees.

8. Estimate of Tax Consequences. It is not anticipated that the favored annexation will cause any adverse tax consequences to residents in the Town or in the area annexed, except that there will be a slight reduction in general services to the residents in the present Town as the general services are expanded into the newly annexed territory. It is anticipated that the residents in the territory to be annexed will experience an increase in their property tax by the amount of the Town's mill levy. The Town's current mill levy is 16.0 mills and the County's mill levy is 5.2 mills, therefore a 10.8 mill levy increase to the subject area will occur.

This increase will be offset by a reduction of the sewer disposal fee of $.03 per gallon in unincorporated areas to the Town's rate of $.0075 per gallon. (The estimated annual use is 2,000 gallons per residence.) There will be an elimination

of the $20.00 per year contribution for the Alta Central Services rendered to the subject area.

It is estimated that the County unincorporated tax (i.e. 5.2 mills) generates less that $2,000.00 per annum; assessed values provided by Salt Lake County Assessor's Office total $218,215.00. The proposed annexation will not cause any increased tax burden on the Town residents. (See Exhibit "B")

Persons in the newly annexed territory will probably experience reductions in their fire insurance rates from Class 10 to Class 7 and in property insurance rates.

9. Area. Acreage: Private real property is 38.65 acres, and the balance of the area is owned by the United States government, managed by the Forest Service. Estimated amount of acreage is 925+ acres.

10. Interests of Affected Entities. The only other "affected entity", as that term is defined in Section 10-1-104(8), Utah Code Annotated (1953), as amended, is Salt Lake County. The interests of that entity have been fully set out herein. In general, it is foreseen that the loss in tax revenues will be offset by the decrease in cost of services to the area here favored for annexation. Therefore, there will be no overall effect on salt Lake County.

11. Other Considerations. The Town of Alta hereby declares that the annexation favored herein will allow the continuation of the high quality of urban governmental services to the area in question and will provide for the protection of the public health, safety and welfare. Such

policy is further necessary in order to insure the environmental balance of the location of the property and to enhance the quality of life of the residents of Little Cottonwood Canyon without inhibiting the enjoyment of the public land by the citizens of the Salt Lake Valley, the State of Utah and the nation.

IN WITNESS WHEREOF, the Town Council of the Town of Alta, Utah, has duly approved, adopted and passed this Ordinance at a regular meeting on the day of 1981, and further declares that the immediate preservation of the peace, health and safety of the Town requires that this Ordinance become effective immediately. This Ordinance shall become effective immediately upon the posting thereof by the Town Clerk in at least three (3) conspicuous places within the Town limits.

By: /s/_____
WILLIAM H. LEVITT
Mayor

ATTESTED:

/s/_____
Town Clerk

Date of Posting:

July 16, 1981

APPENDIX F

INTERGOVERNMENTAL AGREEMENT
WATER SUPPLY AGREEMENT
SALT LAKE CITY TO ALTA CITY

THIS AGREEMENT made and entered into as of the 12th day of August, 1975, by and between SALT LAKE CITY CORPORATION, a municipal corporation of the State of Utah, hereinafter CITY, and Town of ALTA, a municipal corporation of the State of Utah, hereinafter ALTA.

WITNESSETH

WHEREAS, Alta is a body corporate and politic of the State of Utah situated in Little Cottonwood Canyon, Salt Lake County, Utah established pursuant to the laws of the State of Utah for the purposes of furnishing municipal services, to the residents and developments with in the boundaries of Alta City; and

WHEREAS, Alta represents that it is presently in compliance with the ordinances, rules and regulations of the Salt Lake City County Health department and State and Federal regulatory agencies concerning sanitation water use and treatment, sewage disposal incident to the uses and developments and rules and regulations within the Salt Lake City watershed area; and

WHEREAS, City owns and/or controls the major portion of the primary waters of Little Cottonwood Canyon

for the use and benefit of Salt Lake City residents, some of which, at this time, can be made available to Alta; and

WHEREAS, City and Alta desire to enter into an agreement for the supply of water to Alta in accordance herewith.

NOW, THEREFORE, in consideration of the premises, the parties agree as follows:

1. City agrees to make available to Alta for its use, as hereinafter described, the normal flow of raw, untreated water, not to exceed 265,000 gallons per day, emanating from either of the following locations, to-wit:

Entrance to Bay City Mine

1500 feet more or less West, and 400 feet more or less South from the South East Corner Section 32 T.2S., R.3E., S.L.B. & M.

The vector of the tunnel is in a Northeasterly direction.

Alternate Point of Diversion above the Snake Pit on Little Cottonwood Creek.

200 feet more or less East and 2950 feet more or less South from the Southeast Corner Section 32, T.2S., R.3E., S.L.B. & M.

2. If the Agreement between City and Alta Peruvian Lodge and others, dated May 20, 1976, is not terminated within one year from the date on which Alta first begins using water hereunder, the maximum amount of water to which Alta is entitled under Article 1 hereof, shall be reduced thereafter by 150,000 gallons per day.

3. Alta agrees to construct or have constructed, from said water sources and diversion points to the various users of water intended to be served within the city limits, all necessary pipelines, facilities, fixtures and appurtenances thereof, all of which shall be acquired or constructed at the sole cost of Alta, and Alta shall maintain and repair the same together with any tanks, pumps or other equipment and facilities necessary or incidental to the movement and/or treatment of the water from said points of diversion to the various users within Alta's city limits.

4. City shall have no obligation whatsoever to Alta or any of its users, lessees, assigns or grantees with regard to the construction, maintenance or repair of said facilities, and Alta agrees that the same will, at all times, be so maintained and policed as to prevent loss or waste of water from the distribution system.

5. Alta will install at its sole cost and to City specifications, all necessary meters and shut off valves so that City can measure and control the amount of water used by Alta and agrees not to use or allow the use of any water through said system without said metering devices attached. Alta agrees to convey to City said valves and facilities from the source to said shut off valves and meters, and thereafter City shall maintain and/or replace the same to and including

said shut off valves.

6. City will at all times be provided with complete access to said facilities, valves and meters, and Alta agrees to obtain and deed to City all rights-of-way and easements deemed necessary for such access by City.

7. City shall, from time to time, read said meters and compute the amount of water used by Alta, which will be billed once each month at the then prevailing City water rates for water served inside City's limits as provided by the then current City ordinance. Alta agrees to pay said charge within 15 days after a statement is forwarded by City.

8. It is expressly understood and agreed that said pipelines shall not be extended to or supply water to any properties or facilities not within the present city limits of Alta without the prior written consent of City.

9. The uses of the water supplies hereunder shall be limited solely to domestic and commercial culinary purposes and uses incidental thereto, and it shall not be used for agricultural irrigation or sprinkling of any type.

10. Alta agrees to receive the water furnished hereunder by City "as is", with no representations by City as to quality or purity. City shall be under no obligation whatsoever to render said water fit or suitable for human consumption.

11. It is understood and agreed that City has prior statutory and contractual obligations to deliver water to its inhabitants, and its surplus water to firms and corporations in

the canyon and elsewhere, and this Agreement is made only as to surplus waters in excess of City's needs and obligations, and if at any time and for any reason, in City's sole judgment, it is unable to furnish the water provided for by this Agreement, it may reduce the amount of water allowed hereunder or cancel and terminate this Agreement upon 30 days written notice by personally serving or mailing by certified or registered, written notice thereof to Alta City, at Alta, Utah, provided however, that the foregoing shall in no way prohibit City from assigning or transferring its obligations hereunder to another supplier or from making other arrangements for supplying water hereunder to Alta.

12. Alta recognizes City's need to protect its watershed and specifically agrees to be bound by and comply with all City water ordinances, applicable County ordinances, Salt Lake City-County Board of Health regulations and applicable State law. It is understood and agreed that City may immediately or after notice terminate this Agreement, without any liability whatsoever, for Alta's violation of any of the terms and conditions hereunder, or for Alta's failure or refusal within five (5) days after written notice to correct any Alta controller or controllable condition violating, or to enforce violation against others within its city limits of, then in force City and/or County watershed ordinances or any sanitary regulation of the Salt Lake City-County Board of Health or State law.

13. Alta agrees that until the EPA 208 Study is complete there will be no additional users of water added to the system beyond those now in existence to whom water service is presently contemplated.

14. Neither this Agreement nor the benefits nor obligations hereunder are assignable by Alta without the prior written consent of City.

15. Alta agrees to indemnify, save harmless and defend City, its agents and employees, from and against any and all suits, legal proceedings, claims, mechanics liens, demands, costs and attorney's fees arising out of or by reason of Alta's construction, replacement and maintenance of said water lines and attendant facilities and use of said water obtained hereunder. Alta further agrees to maintain in force at its own expense during the life of this Agreement, a comprehensive general liability insurance policy with additional coverage for contractual, completed operations and products liability in the minimum amounts of $1000,000/$300,000 for bodily injury and $50,000 for property damage, and naming City as an additional named insured for all risks involved hereunder.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the day and year first above written.

SALT LAKE CITY CORPORATION

By /s/_____
MAYOR

ATTEST:

/s/_____
CITY RECORDER

TOWN OF ALTA

By /s/_____
MAYOR

ATTEST:

/s/_____
ACTING TOWN CLERK

STATE OF UTAH)
: ss.
County of Salt Lake)

On the 12th day of August, 1975, personally appeared before me TED L. WILSON and MILDRED V. HIGHAM, who being by me duly sworn, did say that they are the MAYOR and CITY RECORDER, respectively, of SALT LAKE CITY CORPORATION, and that said instrument was signed in behalf of said corporation by authority of a motion of its Board of Commissioners passed on the 12th day of August, 1975; and said persons acknowledged to me that said corporation executed the same.

/s/_____
NOTARY PUBLIC, residing in
Salt Lake City, Utah

My Commission Expires: 1-8-79

STATE OF UTAH)
: ss.
County of Salt Lake)

On the 11th day of August, 1975, personally appeared before me William H. Leavitt and Jeffery Anderson, who being by me duly sworn, did say that they are the MAYOR and ACTING TOWN RECORDER, respectively, of ALTA CITY, and that said instrument was signed in behalf of said corporation by authority of a motion of its Board of Commissioners passed on the 14th day of March, 1975; and said persons acknowledged to me that said corporation executed the same.

/s/_____
NOTARY PUBLIC, residing in
Salt Lake City, Utah

My Commission Expires: 10-31-97

STATE OF UTAH)
: ss.
City and County of Salt Lake)

I, Mildred V. Higham, City Recorder of Salt Lake City, Utah, do hereby certify that the attached document is a full, true and correct copy of an Intergovernmental Agreement between Salt Lake City Corporation and the Town of Alta for furnishing water (municipal services, to the residents and developments within the boundaries of the Town of Alta passed by the Board of Commissioners of Salt Lake City, Utah, August 12, 1976 as appears of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of said City, this 12th day of August, 1976.

/s/_____
City Recorder

AMENDMENT OF INTERGOVERNMENTAL
SALT LAKE CITY TO ALTA CITY
WATER SUPPLY AGREEMENT

APPROVED April __, 1980
By Mildred V. Higham

THIS AGREEMENT is made and entered into as of the 1st day of April, 1980, by and between SALT LAKE CITY CORPORATION, a municipal corporation of the State of Utah, hereinafter CITY, and the TOWN OF ALTA, a municipal corporation of the State of Utah, hereinafter ALTA.

WITNESSETH:

WHEREAS, on or about the 12th day of August, 1976, the City and Alta entered into an Intergovernmental Agreement for sale of water from Salt Lake City to Alta; and

WHEREAS, the parties are now desirous of amending paragraph 7 of said Agreement.

NOW, THEREFORE, in consideration of the premises, the parties agree to amend paragraph 7 of said agreement which shall read from inception of the Agreement as follows:

7. City shall, from time to time, read said meters and compute the amount of water used by Alta, which will be billed once each month at initially 12¢ per 100 cubic feet, which amount shall be reviewed once each year during the term hereof and may be raised or lowered at that time at the option of City by notifying Alta of said rate change in writing.

Alta agrees to pay said water bill within 30 days after a statement is forwarded by City. Failure to pay said bill within said 30 days shall be grounds for cancellation of this agreement, and Alta agrees to pay City a reasonable attorney's fee and all costs and expenses for collection of any such outstanding bill.

Except as modified by the foregoing, said Agreement between the parties dated August 12, 1976, shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the day and year first above written.

SALT LAKE CITY CORPORATION

By /s/_____
MAYOR

ATTEST:

/s/_____
CITY RECORDER

TOWN OF ALTA

By /s/_____
MAYOR

ATTEST:

/s/_____
TOWN CLERK

STATE OF UTAH)
: ss.
County of Salt Lake)

On the 1st day of April, 1980, personally appeared before me TED L. WILSON and MILDRED V. HIGHAM, who being by me duly sworn, did say that they are the MAYOR and CITY RECORDER, respectively, of SALT LAKE CITY CORPORATION, and that said persons acknowledged to me that said corporation executed the same.

/s/_____
NOTARY PUBLIC, residing in
Salt Lake City, Utah

My Commission Expires: 1-8-83

STATE OF UTAH)
: ss.
County of Salt Lake)

On the 19th day of March, 1980, personally appeared before me WILLIAM H. LEAVITT and KATHERINE SUE BLACK, who being by me duly sworn, did say that they are the MAYOR and TOWN CLERK, respectively, of ALTA TOWN, and said persons acknowledged to me that said City executed the same.

/s/_____
NOTARY PUBLIC, residing in
Salt Lake City, Utah

My Commission Expires: 1-23-84

Supreme Court, U.S.
FILED
JAN 18 1999
OFFICE OF THE CLERK

No. 99-7

IN THE

Supreme Court of the United States

RAYMOND A. HAIK; MARK C. HAIK,

Petitioners,

v.

TOWN OF ALTA, a political subdivision of the State of Utah; SALT LAKE CITY CORPORATION, a policital subdivision of the State of Utah,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT SALT LAKE CITY CORPORATION, A POLITICAL SUBDIVISION OF THE STATE OF UTAH

STEVEN W. ALLRED*
CHRISTOPHER E. BRAMHALL
SALT LAKE CITY ATTORNEY'S OFFICE
Attorneys for Respondent Salt Lake City Corporation, a political subdivision of the State of Utah
451 South State Street
Suite 505
Salt Lake City, Utah 84111
(801) 535-7788

* *Counsel of Record*

154551

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Statement of the Case and Statement of Key Facts	1
Summary of Argument	6
Reasons for Denying the Writ	7
I. Petitioners' Argument I Does Not Apply To Salt Lake City.	7
II. Petitioners' Argument II Does Not Apply To Salt Lake City.	7
III. Petitioners' Argument III Does Not Apply To Salt Lake City.	8
IV. Even Assuming The Equal Protection Clause Applies To Salt Lake City In This Case, Both The District Court And The Court Of Appeals Correctly Applied Settled Law To Undisputed Facts, And Reached The Correct Conclusion.	9
A. Both The District Court And The Court Of Appeals Properly Stated The Applicable Law.	10
B. The District Court And The Court Of Appeals Correctly Applied These Principles To The Facts In This Case.	12

Contents

Page

C. There Is No Conflict Between Or Among The Circuit Courts Of Appeals Regarding Any Matter Of Law Applicable To This Case. 16

V. Petitioners' Plight Is Self-Inflicted, And Does Not Present Compelling Reasons For Granting Petitioners' Petition For A Writ Of Certiorari. 17

Conclusion 18

TABLE OF CITED AUTHORITIES

Page

Cases:

Bowles v. United States, 31 Fed Cl. 37 (Ct. Fed. 1994) 16

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 11, 12, 14

Del Monte Dunes of Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1995) 16

Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990) 11, 16

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 14

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1997) 16

Railway v. New York, 336 U.S. 106 (1949) 14

Riddle v. Mondragon, 83 F.3d 1197 (10th Cir. 1996) 11

United States v. Castillo, 140 F.3d 874 (10th Cir. 1998) 11

United States R.R. Retirement Bd. v. Fritz, 449 U.S. 116 (1980) 11

Vacco v. Quill, 521 U.S. 793, 117 S. Ct. 2293 (1997) 10, 11

Cited Authorities

Page

United States Constitution:

Fourteenth Amendment 6

U.S. Const. amend. XIV, Sec. 1 10

Rule:

Supreme Court Rule 10 ..... 10, 12, 16, 17

STATEMENT OF THE CASE AND STATEMENT OF KEY FACTS

Salt Lake City generally accepts Petitioners' Statement of the Case and statement of the key facts, with the following exceptions and additions:

Petitioners' property is located in Little Cottonwood Canyon, which constitutes one of Salt Lake City's most important watersheds. Little Cottonwood Canyon is not situated within the corporate boundaries of Salt Lake City, nor is it within the extraterritorial service area of the City. Salt Lake City provides no municipal services in Little Cottonwood Canyon. Salt Lake City does not treat or distribute any water in the Canyon. Salt Lake City is, however, the owner of significant water rights in Little Cottonwood Canyon, which water is transported by the City for use by its customers within the Cities service area located many miles from the Canyon. Over time, the City has entered into a number of water supply contracts in Little Cottonwood Canyon whereby the City allows raw, untreated water to be diverted within the Canyon and used by the purchasers. Although Salt Lake City is the most convenient source of water for property owners in Little Cottonwood Canyon, it is not the only source. Property owners may seek water through a variety of other sources.

On August 12, 1976, Salt Lake City and the Town of Alta entered into that certain Intergovernmental Agreement Water Supply Agreement Salt Lake City to Alta (the "Water Supply Agreement"), pursuant to which Salt Lake City agreed, subject to specific terms and conditions, to sell water to Alta. Alta is responsible for diverting the water, and constructing the pipelines and facilities necessary to deliver that water to its water customers. The Water Supply

Agreement provides that: "It is expressly understood and agreed that said pipelines shall not be extended to or supply water to any properties or facilities not within the present city limits of Alta without the prior written consent of [Salt Lake] City." Petition App. F at 80a.

Petitioners' attempt to put a positive spin on this language, stating that under the Water Supply Agreement, "water could be extended to [Petitioners'] property with Salt Lake City's consent . . ." Petition at 3. However, the District Court correctly characterized the restriction as follows:

> Paragraph 8 is phrased not in the affirmative language of grant ("Alta may extend its pipelines . . . as approved by Salt Lake City"), but in the negative language of limitation. . . . In essence, Paragraph 8 takes the extension of Alta's water pipelines beyond its 1976 limits out of the subject matter of the Water Supply Agreement and makes such extensions the subject of a future, separate agreement requiring Salt Lake City's prior assent in writing.

Petition App. B at 42a.

In 1983, Alta requested an amendment to the Water Supply Agreement, authorizing an extension of water service into the newly annexed Albion Basin area (where Petitioners' lots are located). Salt Lake City denied the request. In 1988, Salt Lake City reaffirmed to Alta, in writing, its policy of denying the extension of water service into the Albion Basin area, because of the detrimental effect that further development in that area would have on water quality.

Petitioners purchased their four lots in 1994. All four lots are located outside of Alta's 1976 boundaries, and

therefore may not be served by Alta under the terms of the Water Supply Agreement.

At the time of purchase, each of the lots was, and continues to be, entitled to 50 gallons of water per day pursuant to longstanding contracts with the Little Cottonwood Water Company.[1] However, State law adopted after the execution of these contracts, but long before Petitioners' purchase, requires that 400 gallons[2] per day be available to each proposed new residence before a building permit will be issued.

Petitioners' predecessor in interest in the property is Mr. Marvin A. Melville, who had owned all four lots for many years. Mr. Melville had attempted on numerous occasions during the late 1970's to obtain additional water from Salt Lake City in order to qualify for a building permit from Salt Lake County, and was repeatedly turned down. A lawsuit initiated by Mr. Melville against Salt Lake County, seeking the right to develop his property, resulted in a judgment against Mr. Melville because he was not able to demonstrate the right to the minimum water supply required under State law.

At the time Petitioners purchased the lots in 1994, they either knew of Mr. Melville's and Alta's failed attempts to get additional water to the property or, based upon public records and the extremely low price paid for the lots, should have known.

The development of Salt Lake City's water sales policies in its watershed areas has a long history. Salt Lake City has

1. The Little Cottonwood Water Company has been dissolved, and its contracts are administered by Salt Lake City.

2. State law currently requires 800 gallons per day.

collected and compiled data on water quality in the streams located within its watershed for over 40 years. Since 1970, Salt Lake City and other governmental entities with direct interests in protecting the watershed have conducted at least six major studies assessing water quality or watershed management practices. Based upon the findings and recommendations of these studies, and the long experience of Salt Lake City in providing culinary water service, Salt Lake City has concluded that increased residential and commercial development in the watershed has a direct, negative impact on water quality.

In the early 1980's, Salt Lake City adopted a temporary moratorium on new canyon water sales, pending further study of water quality and watershed management practices. In April 1988, in reliance upon such water quality studies, the Salt Lake City Council adopted a Watershed Management Plan, which included numerous recommendations restricting canyon water sales. In April 1991, in reliance upon the studies referenced above, the Salt Lake City Council adopted the 1991 Canyon Water Sales Ordinance, which prohibits the City from entering into any new water sales agreements in the City's watershed, and prohibits the expansion of existing agreements, with three limited exceptions.

Salt Lake City's only major water customer in Little Cottonwood Canyon, other than Alta, is the Salt Lake County Service Area No. 3 — Snowbird (the "Service Area"), which serves Snowbird Ski Resort and the immediately surrounding area. Like the Water Supply Agreement with Alta, Salt Lake City's contract with the Service Area also contains language prohibiting the distribution and use of water outside of the contract boundaries of the Service Area. Consistent with its denial of Alta's requests to expand water service, Salt Lake

City has also denied all Service Area requests to expand water service outside the service boundaries of the Service Area.

Petitioners' have attempted to demonstrate unequal treatment or inconsistency on the part of Salt Lake City by highlighting the City's approval of water use outside of Alta's 1976 boundaries for snowmaking purposes. Snowmaking is an activity which directly benefits the City and has no known harmful effects on the watershed; snowmaking was recommended as an authorized canyon water use in one or more of the above-referenced studies; and snowmaking is one of the three express exceptions set forth in the 1991 Canyon Water Sales Ordinance.

Petitioners have characterized Little Cottonwood Canyon as having "numerous year-round and vacation homes, hotels, shops and other commercial establishments, both within and outside of Alta's town limits." Petition at 5. This is a gross mischaracterization of the Canyon. With the exception of an archive vault at the lower end of the Canyon, all "hotels, shops and other commercial establishments" which are not located within Alta's 1976 boundaries are located within the contract limits of the Service Area. As to "year-round and vacation homes," in the Canyon, these are either (a) located within the 1976 boundaries of Alta or the contract limits of the Service Area; (b) cabins or homes with no water or limited water, built before current State regulations came into effect; or (c) cabins or homes with independent water sources over which Salt Lake City has no control. Little Cottonwood Canyon is much more accurately characterized as wide-open alpine spaces, punctuated by tight pockets of controlled development and ski lift facilities regulated by the Forest Service.

Petitioners repeatedly state and intimate that Alta had more than enough water available under the Water Supply Agreement to service Petitioners' property. Salt Lake City and Alta disputed this assertion as a factual matter before the District Court. The physical availability of the water, however, was held by the District Court to be irrelevant, since "that water is not *legally* 'available' outside Alta's 1976 limits without the consent of the proprietor, Salt Lake City." (Emphasis added.) Petition App. B at 49a.

SUMMARY OF ARGUMENT

Petitioners' Arguments I, II and III relate to a takings claim directed solely toward Alta. Petitioners' sole claim against Salt Lake City is one for injunctive relief, seeking to enjoin the City from withholding its consent to the extension of water lines outside of the Alta's 1976 boundaries to Petitioners' property. Therefore Salt Lake City does not address Petitioners' takings claim.

Petitioners' claim for injunctive relief against Salt Lake City is grounded in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Petitioners' equal protection arguments were properly briefed and argued before the District Court and the Court of Appeals, and were found to be lacking. Both lower courts correctly articulated the legal standards applicable in an equal protection case. Petitioners have not argued otherwise. Both courts recognized that access to water necessary to develop real property is not a fundamental right, and therefore applied a rational basis standards to their analysis. Both courts correctly applied settled law to the facts, and expressly found that the distinctions drawn by Salt Lake City were rationally related to legitimate governmental objectives. Both lower

courts held that Petitioners failed to sustain their burden of proof that Salt Lake City's action was arbitrary, capricious or irrational. Petitioners have failed to articulate a conflict among the circuit courts of appeals. Petitioners have failed to articulate any compelling reasons this Court should reexamine the rulings below. Finally, equitable considerations argue against granting Petitioners further judicial review of this case.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' ARGUMENT I DOES NOT APPLY TO SALT LAKE CITY.

Petitioners, in their Argument I, argue that there has been a taking of their property through governmental action. This argument is not directed toward Salt Lake City. The takings claim is directed solely toward Alta; Petitioners' sole claim against Salt Lake City being one for injunctive relief (seeking to require Salt Lake City to consent to the expansion of the Water Supply Agreement against the City's will). Petition App. A at 13a, n.4. Accordingly, Salt Lake City does not address Petitioners' Argument I.

II.

PETITIONERS' ARGUMENT II DOES NOT APPLY TO SALT LAKE CITY.

Petitioners, in their Argument II, further address their takings claim against Alta. For the reasons stated above, Salt Lake City does not address Petitioners' Argument II.

Petitioners' reference to "Respondents" should be disregarded to the extent such term includes Salt Lake City.

III.

PETITIONERS' ARGUMENT III DOES NOT APPLY TO SALT LAKE CITY.

Petitioners, in their Argument III, argue that the District Court and Court of Appeals erred in holding that Alta did not violate Petitioners' rights to equal protection because Alta has no duty under Utah law to provide water to Petitioners. This argument is not directed toward, and will not be addressed by, Salt Lake City.

Salt Lake City wishes to point out, however, that Alta cannot have a "duty" to deliver water to which it has no legal right. Even if Alta did assume some duty vis-à-vis Petitioners, Alta's duty does not translate into Salt Lake City's duty. Alta may not unilaterally amend the Water Supply Agreement and acquire the right to deliver Salt Lake City's water, contrary to the express terms of the Water Supply Agreement and the refusal of Salt Lake City, repeatedly expressed, to extend the water service area.

IV.

EVEN ASSUMING THE EQUAL PROTECTION CLAUSE APPLIES TO SALT LAKE CITY IN THIS CASE, BOTH THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY APPLIED SETTLED LAW TO UNDISPUTED FACTS, AND REACHED THE CORRECT CONCLUSION.

Salt Lake City argued before the District Court and the Court of Appeals that equal protection analysis is not appropriate in a case such as this. The City has entered into an arm's length contract for the sale of raw, untreated water, outside of its municipal boundaries and outside of its limited extraterritorial service area, and solely in its proprietary, and not governmental, capacity. The City's enforcement of the terms of that contract is being challenged by complete strangers to the contract, on equal protection grounds.

The District Court agreed that equal protection analysis is not appropriate, holding that:

> Salt Lake City has no legal duty to furnish water to users outside its own city limits, be they "similarly situated" or not. As an owner of water rights, Salt Lake City's role in this instance is proprietary rather than administrative. The equal protection yardstick is simply not available to measure Salt Lake City's exercise of its contractual power to consent pursuant to Paragraph 8 of the Water Supply Agreement.

Petition App. B at 44a. The District Court went on to hold, arguendo, that even under rational basis analysis, Salt Lake

City's refusal to consent to the expansion of the Water Supply Agreement satisfied the requirements of the Equal Protection Clause. The Court of Appeals did not reach the question of the applicability of the Equal Protection Clause, but assumed such applicability for discussion purposes. Petition App. A at 7a, n.2. The Court of Appeals also held that Salt Lake City's classifications were constitutional. Each of those holdings will be discussed in greater detail below.

A. Both The District Court And The Court Of Appeals Properly Stated The Applicable Law.

Rule 10 of the Rules of the Supreme Court of the United States (the "Rules"), states that "[A] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Both the District Court and the Court of Appeals properly stated the principles of law involved in equal protection analysis. The following principles were articulated by the Court of Appeals:

- "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, Sec. 1. Petition App. A at 8a.

- This Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, __, 117 S. Ct. 2293, 2297 (1997), Petition App. A at 8a.

- Unless a legislative classification or distinction burdens a fundamental right or targets a suspect class, courts

will uphold it if it is rationally related to a legitimate end. *Id.* Petition App. A at 8a.

- "The interest in water for real estate development is not a fundamental right." *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990). Similar rulings were cited from the Third, Fifth and Seventh Circuit Courts of Appeals. Petition App. A at 8a and 9a.

- To meet a constitutional challenge the state action in question needs only some rational relation to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Petition App. A at 9a.

- Because state action subject to rational basis review is presumptively constitutional, the burden is on the plaintiffs to establish that the state action is irrational or arbitrary and that it cannot conceivably further a legitimate governmental interest. *Riddle v. Mondragon*, 83 F.3d 1197, 1207 (10th Cir. 1996). Petition App. A at 9a.

- "Under the rational basis test, if there is a 'plausible reason[ ] for [the state] action, our inquiry is at an end.' " *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998) (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 116, 179 (1980). Petition App. A at 9a.

- "We need not find that the legislature ever articulated this reason, nor that it actually underlay the legislative decision, nor even that it was wise." *Id.* Petition App. A at 9a.

Likewise, the District Court stated the following equal protection principle:

- Unless a classification trammels fundamental personal rights or implicates a suspect classification, to meet constitutional challenge the law in question needs only some rational relation to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976). Petition App. B at 26a.

Unquestionably, the equal protection principles articulated by the District Court and the Court of Appeals represent settled, standard, oft-cited and accepted rules of law governing equal protection analysis. Under Rule 10, the inquiry generally stops there.

B. The District Court And The Court Of Appeals Correctly Applied These Principles To The Facts In This Case.

Not only, however, were the correct principles of law articulated, but they were in fact correctly applied. Even though a governmental entity has no burden of establishing or articulating the governmental objective sought to be accomplished, Salt Lake City nevertheless described its legitimate governmental objective (namely, to preserve the integrity of the watershed and protect water quality), and demonstrated how its water sales policies were rationally related to that objective.

Both lower courts accepted (and Petitioners acknowledge (Petition at 16)) the legitimacy of Salt Lake City's objectives. Petitioners argue, however, that the means used by the governmental entity must be rationally related to that goal, and that "[b]oth courts below totally ignored this second prong of the rational basis test." Petition at 16. Quite to the contrary. Both lower courts expressly found that

the City's means to achieve its objective were rationally related to that objective. The District Court stated:

> . . . Salt Lake City responds that limiting development outside Alta's 1976 limits was accomplished "for the very purpose of preventing development over a dispersed area, since dispersed development has a greater detrimental impact on water quality," thus furnishing a rational basis for the distinction challenged by the [Petitioners]. . . . While the [Petitioners] dispute this rationale, they have not shown it to be arbitrary or capricious, or for that matter, unreasonable.

Petition App. B at 44a, n.15. The Court of Appeals similarly found that:

> . . . Salt Lake City has a legitimate interest in preserving its watershed. The [Petitioners] failed to establish that Salt Lake City's refusal to consent to the extension of Alta's water lines to their property was irrational or arbitrary or that it could not conceivably further a legitimate governmental interest in view of the extensive evidence presented by Salt Lake City regarding preservation of its watershed, Little Cottonwood Canyon.

Petition App. A at 10a. Petitioners have alleged favoritism or unequal treatment on the part of Salt Lake City by citing three examples of City approvals of expanded water use. The Court of Appeals noted that all three approvals were consistent with either the Water Supply Agreement or the 1991 Canyon Water Sales Ordinance, and stated:

> The Salt Lake City Council has made a rational legislative determination that the particular uses above, even if outside existing service areas, will not result in significant harm to the watershed, whereas increased residential and commercial use outside existing service areas (in this case Alta's 1976 town boundaries) will result in such damage. *This classification is rational and is related to the City's stated objective of protecting the watershed.*

(Emphasis added.) Petition App. A at 10a.

Petitioners argue that the City's policies are irrational, or arbitrary, because Alta's 1976 boundaries bear no relationship to geographic or geologic features. Petition at 18. However, it is well established that classifications will not be struck down simply because they are underinclusive. *Railway v. New York*, 336 U.S. 106 (1949). It is rational for the City to conclude that geographic limitations, which prevent sprawling development, will help preserve water quality. In the case of the Water Supply Agreement with Alta, perhaps the circle could have been broader. Perhaps it could have been tighter. That it should be somewhere, however, is not an irrational conclusion, and identifying its precisely optimum location is neither scientifically possible, nor required by law. The Supreme Court has stated: "Perfection in making the necessary classifications is neither possible nor necessary," *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); and "[R]ational distinctions may be made with less than mathematical certitude," *City of New Orleans v. Dukes*, *supra*. In 1976, Alta's boundaries were a legal, political and geographic reality. The town was already in existence at that time. It

was rational for Salt Lake City to determine in 1976 to sell a limited quantity of water within those boundaries, but to foreclose further expansion. That some sensitive watershed territory within those boundaries is subject to harmful development does not mean that all sensitive lands outside those boundaries must share an identical fate. Lines must be drawn somewhere. As the District Court correctly observed: "That the [Petitioners'] preferred outcome may be reasonable or rational does not of necessity render the contrary outcome unreasonable or irrational. Circumstances often admit more than one rational or reasonable result." Petition App. B at 41a and 42a.

Salt Lake City will not repeat here its rationale and justification for its canyon water sales policies. Suffice it to say that those policies are neither arbitrary nor capricious, but are, in fact, the result of a long and deliberate process involving years of study, and culminating in a legislative finding and policy determination by the City Council. One may second guess the decision of the City Council, and argue endlessly over the merits of the end result. But one cannot successfully argue that the City Council was arbitrary, capricious or irrational. Petitioners may not be happy with the City's decision, but such unhappiness does not render the City's decision unreasonable.

There were no genuine issues of material fact before the District Court. Petition App. B at 53a. The holdings of both lower courts regarding Petitioners' equal protection arguments against Salt Lake City are clearly supported by the undisputed facts, and by proper application of correctly stated legal principles to those facts. Both courts expressly held that Petitioners failed to articulate and demonstrate otherwise.

C. There Is No Conflict Between Or Among The Circuit Courts Of Appeals Regarding Any Matter Of Law Applicable To This Case.

Rule 10 of the Rules provides that the Court will consider granting a petition for a writ of certiorari when, among other things, "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."

Petitioners cite such a conflict as a reason for granting their Petition in this case. The only conflict suggested by Petitioners, however, is that the Court of Appeals' decision in this case is "inconsistent with the implicit basis underlying the holding" in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1997); *Del Monte Dunes of Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1995); *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990); and *Bowles v. United States*, 31 Fed Cl. 37 (Ct. Fed. 1994), in that it "ignores the need, even under a rational basis test, to find a relationship between the distinction drawn and the ends sought to be advanced." Petition at 18. *Nollan*, *Del Monte Dunes* and *Bowles* are all takings cases. As to *Lockary*, the holding by the Court of Appeals is not inconsistent with *Lockary* since, as we have seen, the Court of Appeals did indeed address the rational relationship issue, expressly found that the Salt Lake City Council had made a rational legislative determination, and further held that Petitioners had failed to establish that the City's actions were arbitrary or irrational.

Ultimately Petitioners' argument is reduced to a disagreement over whether Salt Lake City's policies are rational or irrational. There is no disagreement over legal principles. There is no disagreement over facts. There are

no conflicting precedents to resolve. There is simply a disagreement over the rationality of the City's efforts to protect its watershed. All legal presumptions are in favor of the City. Two federal courts have ruled in favor of the City. There are simply no issues of broad import sufficient to invoke the scrutiny of this Court.

V.

PETITIONERS' PLIGHT IS SELF-INFLICTED, AND DOES NOT PRESENT COMPELLING REASONS FOR GRANTING PETITIONERS' PETITION FOR A WRIT OF CERTIORARI.

Rule 10 of the Rules provides that a petition for a writ of certiorari will be granted only for compelling reasons. Nothing about Petitioners' circumstances would compel review by the United States Supreme Court. Mr. Haik, a city attorney, and his son, should have been aware of the long and unsuccessful battle of their immediate predecessor in interest, Mr. Melville, to obtain additional water for his property; of his repeated requests to Salt Lake City to obtain water; of Salt Lake City's repeated denials; and of Mr. Melville's failure to prevail in the courts. They were aware that the price they paid for the lots was only a fraction of the value of similar lots with water. As recognized by the District Court, Petitioners have now exactly what they purchased from Mr. Melville and paid for in 1994; namely, four lots with insufficient water to obtain a building permit. Petition App. B at 46a. Equity is not on the side of Petitioners. These lots were purchased for purposes of speculation. Petitioners are seeking this Court's assistance in providing them with an economic windfall. This is not a case that deserves or requires the attention of this Court.

CONCLUSION

For the reasons set forth above, and for those set forth in Alta's Brief in Opposition, the Petition should be denied.

Respectfully submitted,

STEVEN W. ALLRED*
CHRISTOPHER E. BRAMHALL
SALT LAKE CITY ATTORNEY'S OFFICE
Attorneys for Respondent
Salt Lake City Corporation,
a political subdivision of the
State of Utah
451 South State Street
Suite 505
Salt Lake City, Utah 84111
(801) 535-7788

* *Counsel of Record*

Supreme Court, U.S.
FILED
AUG 16 1999
OFFICE OF THE CLERK

No. 99-7

IN THE

Supreme Court of the United States

RAYMOND A. HAIK; MARK C. HAIK,

Petitioners,

v.

TOWN OF ALTA, a political subdivision of the State of Utah; SALT LAKE CITY CORPORATION, a policital subdivision of the State of Utah,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TOWN OF ALTA, A POLITICAL SUBDIVISION OF THE STATE OF UTAH

CRAIG V. WENTZ
DAVID C. RICHARDS*
CHRISTENSEN & JENSEN, P.C.
Attorneys for Respondent Town of Alta, a political subdivision of the State of Utah
50 South Main Street
Suite 1500
Salt Lake City, Utah 84144
(801) 355-3431

* *Counsel of Record*

154563

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether Alta violated the Haiks' right to equal protection by refusing to extend its water lines to their lots when Alta's contract with Salt Lake City forbids such extensions absent Salt Lake City's consent?

2. Whether Alta's conduct in refusing to issue building permits to the Haiks constituted a taking without compensation when the Haiks did not have the requisite water supply required by State and local law?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	viii
Statement of the Case	1
Reasons for Denying the Writ	5
I. Certiorari Should Not Be Granted. Petitioners Have Shown No Compelling Reason Why This Court Should Exercise Its Discretion To Review The Decisions Of The District Court And The Tenth Circuit Court Of Appeals.	5
II. The District And Circuit Courts Correctly Determined That Alta Did Not Violate The Haiks' Right To Equal Protection.	7
A. Limits of judicial review under the Rational Basis Test.	7
B. Alta's conduct was rationally related to legitimate governmental objectives.	8
C. The Haiks' claims of "pretextual conduct" by Alta are without merit.	9

Contents

	Page
III. The District And Circuit Courts Correctly Held That The Town Has No Duty To Provide Water Service To All Town Residents.	12
A. Alta does not have an unconditional duty to supply water to the Haiks under applicable Utah case law.	12
B. Alta has no absolute duty to supply water to the Haiks under Utah's annexation statute or under the Town's 1981 Policy Declaration.	15
C. The terms of the 1981 Policy Declaration were not amended to include assurances that water would be provided to the Albion Basin.	18
IV. The District And Circuit Courts Correctly Concluded That No Taking Occurred Because The Haiks Purchased Land That Lacked The Right To Receive 400 Gallons Of Culinary Water Per Day, A Prerequisite To Development Of The Land.	20
V. The District And Circuit Courts Correctly Concluded That The Haiks Had No Taking Claim Because They Purchased The Property After The Restricting Regulations Were In Place.	24
Conclusion	28

TABLE OF CITED AUTHORITIES

Page

Cases:

Bagford v. Ephraim City, 904 P.2d 1095 (Utah 1995) 20

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 23

Bowles v. United States, 31 Fed. Cl. 37 (1994) ... 28

Chatham v. Jackson, 613 F.2d 73 (5th Cir. 1980) .. 7

Child v. City of Spanish Fork, 538 P.2d 184 (Utah 1975) 12, 13, 14

Colman v. Utah State Land Bd., 795 P.2d 622 (Utah 1990) 22

Del Monte Dunes at Montery, Ltd. v. City of Montery, 95 F.3d 1422 (9th Cir. 1996), *aff'd on other grounds*, __ U.S. __, 119 S. Ct. 1624 (1999) ... 27

F.C.C. v. Beach Communications, Inc., 508 U.S. 307 (1993) 7, 8

Hoeck v. City of Portland, 57 F.3d 781 (9th Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996) 24

Hughes v. Washington, 389 U.S. 290 (1967) 23

Cited Authorities

Page

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 8

Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990) 7, 11, 27

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 25

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed.Cir. 1994) 22

Lucas v. South Carolina Coastal Council, 505 U.S. 1002 (1992) 6, 21, 22, 23, 24, 28

Lyng v. International Union, 458 U.S. 360 (1988) 14

Magnuson v. City of Hickory Hills, 933 F.2d 562 (7th Cir. 1991) 7

Matthews v. Diaz, 426 U.S. 67 (1976) 15

Melville v. Salt Lake County, 570 P.2d 687 (Utah 1977) 26

Nolan v. California Coastal Comm'n, 483 U.S. 825 (1987) 25, 26

Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690 (8th Cir. 1996) 24

Cited Authorities

Page

Platt v. Town of Torrey, 949 P.2d 325 (Utah 1997) 13, 14

Ransom v. Marrazzo, 848 F.2d 398 (3rd Cir. 1988) 7

Rose v. Plymoth Town, 173 P.2d 285 (Utah 1946) 12, 14

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 23

Smith Inv. Co. v. Sandy City, 958 P.2d 245 (Utah App. 1998) 13

Thompson v. Salt Lake City, 724 P.2d 958 (Utah 1986) 13, 14

United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980) 8

Utah State University v. Sutro & Co., 646 P.2d 715 (Utah 1982) 19

Statute:

UTAH CODE ANN. § 10-2-401(4) 15

Rule:

Sup. Ct. R. 10 5

Cited Authorities

Page

Utah Constitution:

Article I, § 22 ..... 6, 20

Other Authorities:

TOWN OF ALTA UNIFORM ZONING ORDINANCE, § 22-7-8(2) 2

UTAH ADMIN. CODE § R309-105-1(1.2.6) (1997) ... 2, 9

Watershed Ordinance, § 17.04.020.A, B(1) 3, 4

TABLE OF APPENDICES

Page

Appendix A — Affidavit Of Kent R. Miner Dated And Filed January 22, 1997 ..... 1a

Appendix B — Reply Affidavit Of Mayor William H. Levitt Dated And Filed April 8, 1997 ..... 3a

Appendix C — Relevant Codes 10a

Appendix D — Minutes Of Public Hearing Dated July 16, 1981 ..... 13a

STATEMENT OF THE CASE

The district court set forth a comprehensive and highly instructive statement of facts in support of its opinion granting the Town of Alta's (hereinafter "Town" or "Alta") Motion for Summary Judgment. *Petitioners' Brief, App. B, at 19a-26a.* The factual findings most pertinent to the issues before this Court, as quoted from the district court, are as follows:

Albion Basin is located above the Alta and Snowbird ski resorts at the top of Little Cottonwood Canyon, east of Salt Lake City, and comprises part of the watershed relied upon by Salt Lake City and other Salt Lake Valley communities for their culinary water supply.

The Little Cottonwood Water Company promised the availability of not more than 50 gallons per day to users in each of not more than 35 cabins to be constructed in the Albion Basin Subdivision #1.

On August 12, 1976, Salt Lake City entered in to the INTERGOVERNMENTAL AGREEMENT — WATER SUPPLY AGREEMENT SALT LAKE CITY TO ALTA CITY ("Water Supply Agreement"). . . . The Water Supply Agreement provides that Salt Lake City "agrees to make available to Alta for its use, as hereinafter described, the normal flow of raw, untreated water, not to exceed 265,000 gallons per day." [citing ¶ 1 of Water Supply Agreement]. Alta's "use, as hereinafter described," included the following express limitation:

> 8. It is expressly understood and agreed that said pipelines shall not be extended to or supply

> water to any properties or facilities not within the present [1976] city limits of Alta without the prior written consent of [Salt Lake] City.

[citing ¶ 8 of Water Supply Agreement]. It is uncontroverted that in 1976, Albion Basin Subdivision #1 lay beyond the [present] city limits of Alta. Moreover, the Water Supply Agreement recited that "Alta recognizes [Salt Lake] City's need to protect its watershed and specifically agrees to be bound by and comply with all City water ordinances, applicable County ordinances, Salt Lake City-County Board of Health regulations and applicable state law." [citing ¶ 12 Water Supply Agreement]. It also appears uncontroverted that in 1976, "applicable County ordinances" limited construction in the Albion Basin Subdivision #1 to one single family cabin per subdivision lot, which the Board of Health required to be supplied with 400 gallons of water per day as a precondition to issuing a building permit.

In 1981, Alta undertook to annex the Albion Basin Subdivision, which was accomplished by an August 20, 1981 resolution following a July 16, 1981 public hearing. Thereafter, Alta conditioned issuance of building permits in the Albion Basin upon "approval of all uses, regardless of the size or number of units" given "in writing by the Salt Lake City-County Health Department, who shall certify as to the adequacy of the culinary water system and the sewage system." The approval of culinary water and sewer systems "shall be in accordance with the regulations of the Salt Lake City-County Health Department and the Utah Division of Health." TOWN OF ALTA UNIFORM ZONING ORDINANCE, § 22-7-8(2) (1989). The regulations referred to by the Alta ordinance continue to require the availability of 400 gallons of water per housing unit. *See* UTAH ADMIN. CODE § R309-105-1(1.2.6) (1997).

In 1983, Alta requested an amendment to the Water Supply Agreement, authorizing an extension of water service to the newly annexed Albion Basin properties. Salt Lake City, however, declined to consent to the proposed amendment. In 1988, however, Salt Lake City adopted a Watershed Management Plan and consented to Alta's use of water for snowmaking within Alta's city limits, which by 1988 included land within the Albion Basin area.

In April 1991, the Salt Lake City Council adopted a Watershed Ordinance, § 17.04.020.A, B(1) of the Salt Lake City Ordinances, which, *inter alia*, prohibits the city from entering into any new water sales agreements or expanding any existing agreements, with three exceptions:

> (a) water sales for residential use to property owners with a spring on the property;
>
> (b) water sales to governmental entities for us on land they own or lease; or
>
> (c) water sales for snowmaking and fire protection in certain cases.

In 1992, pursuant to the 1991 ordinance, Salt Lake City agreed to supply water to the United States Forest Service for recreational purposes at several locations, including the Albion Basin campground. In 1993, Salt Lake City gave consent to use of additional water for snowmaking by the Alta Ski Lifts Company. In 1995, Salt Lake City also consented to the extension of Alta's municipal water lines to an expanded Alpenglow lodge facility, which purportedly falls within the 1976 city limits of Alta and therefore within the terms of the 1976 Water Supply Agreement.

A month later, in October 1994, the Haiks stepped into this milieu by purchasing Lots 25, 26, 29 and 30 of the Albion Basin Subdivision #1 from Marvin Melville.

In a November 29, 1994 response to Raymond Haik's written inquiry concerning water and sewer services, Alta informed Haik that Alta does not provide water and sewer services to the Albion Basin Subdivision and referred him to the Salt Lake City Department of Public Utilities, Water Division. Upon inquiry by the Haiks, Salt Lake City in 1996 declined to consent to the extension of Alta water pipes and water supply to the Haiks' lots, relying on Paragraph 8 of the 1976 Water Supply Agreement and the 1991 Watershed Ordinance, § 17.04.020 of the Salt Lake City Ordinances.

In October, 1997, three years after their purchase, the Haiks continue to own Lots 25, 26, 29 and 30 of Albion Basin Subdivision #1, and continued to be unable to build on those lots because of the lack of culinary water supply that remains a legal prerequisite to the construction of dwellings on the property.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD NOT BE GRANTED. PETITIONERS HAVE SHOWN NO COMPELLING REASON WHY THIS COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE DECISIONS OF THE DISTRICT COURT AND THE TENTH CIRCUIT COURT OF APPEALS.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. As will be shown in the following points and authorities, the Tenth Circuit's opinion sustaining the district court's conclusion that Petitioners' equal protection and takings claims should be dismissed is mandated by recent decisions of this Court, and is supported by decisions rendered by the circuit courts of appeal and the Utah Supreme Court.

With respect to Petitioners' equal protection claim that Alta's 1976 Town boundary was irrationally established as the limit for the extension of the Town's water lines, this Court and the circuits have all held that the interest in water for real estate development is not a fundamental right. Neither is there any conflict in state or federal case law that the resultant rational basis test is a "paradigm of judicial restraint," mandating a strong presumption that the statutory classification is valid and holding that the challenged classification must be sustained if any reasonably conceivable state of facts would provide a rational basis for it. Applying this deferential standard of review, the district

court and the Tenth Circuit found the 1976 boundary line to be rationally related to a legitimate governmental interest.

Petitioners' takings claim is premised on the assertion that they have lost all economically viable use of their Albion Basin lots because Alta refused to grant them building permits until they could demonstrate a legal right to culinary water in the amount of 400 gallons per day. The water supply regulations at issue have been in effect in the Albion Basin since 1971. Petitioners purchased their Albion Basin lots in 1994. On these facts, the Tenth Circuit held that Petitioners cannot maintain a taking claim because they did not have a protectable interest in property; that is, the Petitioners were not entitled to a building permit because they did not meet the health department's 400 gallon per day culinary water requirement. In short, Alta could not have "taken" a right or interest Petitioners did not possess. In reaching this decision, the Tenth Circuit relied on decisions by the Utah Supreme Court which mandated such a result under Article I § 22 of the Utah Constitution.

Significantly, the Utah law upon which the Tenth Circuit relied is in close harmony with this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1002 (1992). As this Court pointed out in *Lucas*, "where a regulation deprives land of all economically beneficial use, the state may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1028. In the instant case, the Petitioners did not have a right to obtain a building permit to begin with because they lacked the requisite water rights. As shown below, other circuits have reached similar results in applying the *Lucas* pre-existing limitations rational.

As explained above, there is no compelling reason why this Court should grant certiorari. Nevertheless, Alta is compelled to set the record straight as to the application and interpretation of relevant law. Thus, in sections II through V below Alta demonstrates the absolute correctness of the decisions challenged by Petitioners.

II.

THE DISTRICT AND CIRCUIT COURTS CORRECTLY DETERMINED THAT ALTA DID NOT VIOLATE THE HAIKS' RIGHT TO EQUAL PROTECTION.

The courts below both recognized that the interest in water for real estate development is not a fundamental right. There appears to be no conflict on this point among the circuits. *See Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990); *Magnuson v. City of Hickory Hills*, 933 F.2d 562, 567 (7th Cir. 1991); *Ransom v. Marrazzo*, 848 F.2d 398, 413 (3rd Cir. 1988); *Chatham v. Jackson*, 613 F.2d 73, 80 (5th Cir. 1980). Thus, the state action in question in this case needs only some rational relation to a legitimate state interest.

A. Limits of judicial review under the Rational Basis Test.

This Court defined the limits of equal protection challenges under the rational relation test in *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307 (1993). The Court articulated a highly deferential standard of judicial review:

> Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices . . . [under the rational basis test,

> governmental action] must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis for the classification.* Where there are "plausible reasons" for Congress' action, "our inquiry is at an end."

Id. at 313 (quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 169 (1980)) (emphasis added). The Court characterized this as "a paradigm of judicial restraint." *Id.* A statutory classification is afforded a "strong presumption of validity" and parties challenging the classification "have the burden 'to negative every conceivable basis which might support it.' " *Beach*, 508 U.S. at 315. (*quoting Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Moreover, the Court stated that "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.*

B. Alta's conduct was rationally related to legitimate governmental objectives.

As applied to the facts of this case, the rational basis test warrants a finding that Alta's refusal to extend its waterlines beyond its 1976 boundaries or to issue building permits is rationally related to two very plausible objectives. First, as the Tenth Circuit observed:

> There are plausible reasons for Alta's refusal to extend its waterlines to Haiks' property. Alta has a legitimate state interest in not breaching its 1976 Water Supply Agreement. Alta does not have an independent right to water; it merely purchases

> water from Salt Lake City. Thus, while Alta may have the physical capacity to supply water to the Haiks' lots, it does not have the legal right to do so and to compel Alta to breach its contract would be unreasonable.

(*Petitioners' Brief, App. A*, at 9a).

Second, Alta's refusal to issue building permits to the Haiks is rationally related to the Haiks' inability to satisfy state and local culinary water supply regulations. Those regulations require a minimum culinary water supply of 400 gallons per day. *See* UTAH ADMIN. CODE § R309-105-1(1.2.6) (1997). This same standard of 400 gallons per day has been adopted by the Salt Lake City-County Health Department which, since 1971, has consistently refused to approve building permits unless that standard is met. *Respondent Alta's Brief, App. A*. Alta has adopted the same standard, by incorporation, in its zoning ordinance.

C. The Haiks' claims of "pretextual conduct" by Alta are without merit.

Petitioners argue that the Town's conduct is arbitrary and capricious under the rational relation test, because Alta's reliance on the prohibitions of the 1976 Water Supply Agreement is pretextual; i.e., the Town's true motivation was to prevent development within the watershed. *Petitioners' Brief* at 27-29.[1] Claims of pretext, however, are

---

1. In an apparent attempt to breathe life into their argument that Alta and Salt Lake City engaged in collusive acts to prevent Petitioners from making any economic use of their property, Petitioners allege that "Alta never requested Salt Lake City's consent (Cont'd)

irrelevant unless there is no other conceivable rational basis for the Town's conduct. As previously noted, there are at least two very plausible bases for Alta's conduct, either of which clearly passes muster under the rational basis test.

(Cont'd)

to extension of water to Petitioners' lots." *Petitioners' Brief* at 4. This statement is patently untrue. In its statement of relevant facts, the district court concluded: "In 1983, Alta requested an amendment to the Water Supply Agreement, authorizing an extension of water service to the newly annexed Albion Basin properties. Salt Lake City, however, declined to consent to the proposed amendment." *Petitioners' Brief, App. B*, at 23a. Again, in 1988, Alta requested clarification concerning Salt Lake City's policy regarding the sale of water in the Albion Basin. On March 11, 1988, Salt Lake City responded and informed Alta that the City would not approve of the sale of water by Alta in Albion Basin because of the detrimental effect that further development would have on the water quality. *Respondent Alta's Brief, App. B*, at 5a, ¶ 10 and attachments.

Petitioners also argue that "[d]uring the same period Alta was refusing to consent to extend its water lines to allow residential development in the annexed area, Alta sought, and Salt Lake granted, consent to use Alta's water for snowmaking, both inside and outside Alta's 1976 Town line." *Petitioners' Brief* at 4. Petitioners assertions are out of context and therefore misleading. For example, in 1988 Salt Lake City adopted a Watershed Management Plan that allowed for the use of snowmaking, a non-consumptive use, within the Albion Basin. *Petitioners' Brief, App. B*, at 23a. Furthermore, in 1992, pursuant to its 1991 Watershed Ordinance, Salt Lake City also consented to the use of additional water for snowmaking by the Alta Ski Lifts Company. *Petitioners' Brief, App. B*, at 24a. The only non-snowmaking use, to which Salt Lake City consented was an extension of Alta's municipal water lines to an expanded Alpenglow Lodge facility. The Alpenglow Lodge, however, was situated within the Town's 1976 city limits and was therefore within the terms of the 1976 Water Supply Agreement. *Petitioners' Brief, App. B*, at 24a-25a.

In support of their pretext argument the Haiks cite the Ninth Circuit's opinion in *Lockary v. Kayfetz*, 917 F.2d 1150, 1155-56 (9th Cir. 1990) (remanding for trial because plaintiffs presented facts tending to show that no water shortage existed where, if true, no rational basis would exist for moratorium on water hookups). *Petitioners' Brief* at 16. The instant case bears no similarity to the facts that motivated the remand in *Lockary*. It cannot fairly be contended that Alta's conduct was not genuinely motivated by a legitimate governmental interest. It is undisputed that under the 1976 Agreement Salt Lake City retained the right to forbid any extension of the Alta water system beyond its 1976 limits. Moreover, there is no evidence in the record that Alta has ever disputed the enforceability of the water supply contract. Indeed, the record demonstrates that Alta deemed the contract to be enforceable when it sought Salt Lake City's consent to extend its waterlines in 1983 (consent was refused), and sought clarification regarding the contract's prohibition on extensions in 1988 (refusal to consent to extension was reaffirmed).

Allegations of pretext are irrelevant unless the Haiks can negative every conceivable basis for Alta's conduct and demonstrate that all asserted reasons for such conduct are without factual support. There is no deceit or hidden agenda at issue in this case. The prohibitions contained in the 1976 Water Supply contract and the requirements of state and local water supply regulations constitute hard, verifiable facts.

III.

THE DISTRICT AND CIRCUIT COURTS CORRECTLY HELD THAT THE TOWN HAS NO DUTY TO PROVIDE WATER SERVICE TO ALL TOWN RESIDENTS.

A. Alta does not have an unconditional duty to supply water to the Haiks under applicable Utah case law.

The district and circuit courts both rely on a series of Utah Supreme Court cases which have consistently held that municipal corporations do not have a legal duty to provide water service to all members of the public provided these governmental entities act reasonably in evaluating individual conditions and circumstances.

In *Rose v. Plymoth Town*, 173 P.2d 285 (Utah 1946), the Utah Supreme Court held that mandamus did not lie to compel town authorities to extend their municipal water system to plaintiff's residence located within the town's geographical limits where such extension could be accomplished only at considerable expense. *Id.* at 287. The key to *Rose* is the Court's statement that "[*u*]*nless the town authorities are shown to have failed to exercise judgment or discretion such that a refusal to extend the water system would be unreasonable, their decision is final.*" *Id.* (Emphasis added).

In *Child v. City of Spanish Fork*, 538 P.2d 184 (Utah 1975), the Utah Supreme Court rejected a claim that a municipality's requirement that landowners in a newly annexed area convey shares of water in exchange for annexation was arbitrary, unreasonable, and a denial of equal

protection. The court agreed with the trial court's observation that such a condition "represented prudence in planning for the city's needs" and upheld the conditional annexation as being wholly within the city's powers and not "in any degree unreasonable or arbitrary, ..." 538 P.2d at 186-87. Rejecting the new annexees' claim of unequal treatment as compared to existing residents who made no conveyance of water rights, the court observed that "different treatment of individuals does not necessarily violate the equal protection of the laws assurances." *Id.* at 187. Persons may be treated differently by the law "if the classifications have a reasonable relationship to a proper and lawful purpose, and if all persons within the same class are treated equally." *Id.*

In *Thompson v. Salt Lake City*, 724 P.2d 958 (Utah 1986), Salt Lake City conditioned water service upon agreement by the landowner to be responsible for payment for all water provided to his property. The plaintiff/lessees sued to obtain water service where the landowner/lessor refused to sign such an agreement, asserting that the city had a duty to provide water service and that the condition requiring landowner agreement was "arbitrary, unreasonable, and discriminatory," and denied equal protection of the laws. The Court denied the relief requested, *holding that although municipalities are authorized to provide water service, they are not public utilities and do not "have a legal duty to provide water service to all members of the public. . . ."* 724 P.2d at 959 (emphasis added). *See also Platt v. Town of Torrey*, 949 P.2d 325, 329 (Utah 1997) (a municipality need only act "reasonably" with respect to the provision of municipal services to its residents.); *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 253 (Utah App. 1998). ("If the ordinance and the state policies and reasons underlying it do, within

reason, debatably promote the legitimate goals of increased public health, safety, or general welfare, we must allow . . . legislative judgment to control.")

Thus, *Rose, Child, Thompson* and *Platt* stand for the proposition that municipalities have broad discretion in deciding when and where to provide municipal services and, so long as they are required to exercise judgment or discretion with respect to the supply of such services, their decision is final and not subject to judicial review. The Tenth Circuit put this issue in clear perspective:

> In short, Alta and Salt Lake City proffer they had to draw the line somewhere, and chose to do so in the 1976 Agreement at Alta's 1976 Town boundaries. They do not claim to be seeking to stop all developments in the canyon, or even all development in Alta for that matter. Rather, their purported objective is to curtail further environmentally harmful development outside Alta's 1976 Town boundaries. Line-drawing "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the lines. [That] the line may have been drawn differently at some points is 'not a matter for judicial consideration.' " *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 317-16 (1993) (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

Petitioners' Brief, App. A, at 11a–12a. *See also Lyng v. International Union*, 458 U.S. 360, 370 (1988) (Under the deferential standard of review, drawing lines that create

distinctions is peculiarly a legislative task and an unavoidable one.); *Matthews v. Diaz*, 426 U.S. 67, 83 (1976) (Congressional line drawing necessarily implies that people with differing circumstances will be placed on either side of the line; courts cannot second-guess where to place that line).

Petitioners argue that "the political line that divides the Alpenglow day lodge from Petitioners' property, Alta's 1976 Town boundary, is entirely unrelated to the hydrology or geography of the watershed. The decision to allow significant development on one side of that arbitrary line but none on the other side violates the Petitioners' right to equal protection." *Petitioners' Brief* at 15. Petitioners erroneously assume that a distinct line exists where sensitive watershed areas in the Albion Basin begin and end. More importantly, Salt Lake City had to draw a line somewhere that would define the limits beyond which Alta's water lines could not be extended. That line was drawn at Alta's 1976 town limits — an entirely rational choice given the perceived need to immediately preserve as much of the watershed as possible.

B. Alta has no absolute duty to supply water to the Haiks under Utah's annexation statute or under the Town's 1981 Policy Declaration.

There is no indication in Utah's annexation statute that Alta has an unqualified legal duty to provide water and sewer service to all residents. "Areas annexed to municipalities in accordance with appropriate standards *should* receive the services provided by the annexing municipality, subject to 10-2-424, as soon as possible, following an annexation. . . ." UTAH CODE ANN. § 10-2-401(4) (emphasis added). Section 401(4) does not mandate that annexed areas "*shall*" receive "*all* services" provided by the annexing municipality. Rather,

the Utah legislature was careful only to state that the annexed areas "should" receive "the services" provided by the annexing municipality to ensure that annexation is responsive to the exercise of legislative discretion and local needs. *Respondent Alta's Brief, App. C*, at 10a.

Consistent with the annexation statute, Alta's 1981 Policy Declaration is noticeably silent as to the provision of water services as part of the Albion Basin annexation. Paragraphs 5 and 6 of that Declaration provide:

> 5. *Need for municipal services*. The Town of Alta presently owns, operates and maintains a sanitary disposal system in the form of a dumping station connected to the Town sewer system. In addition, the Town provides police and fire protection to its residents, and avalanche warning and protection system and planning and zoning services. All such services are absolutely essential for any urban development within the area proposed, given the location of the area involved and the fact that the same lies within the watershed of Salt Lake City. All such services would be available to the area proposed for annexation. The Town recognizes that certain portions of the area anticipate obtaining such services from Salt Lake County. However, such would result in an unnecessary duplication of services and an inefficient use of resources, which would severely impair the programs now in operation. The Town declares that it can provide the necessary services in the most beneficial, economic and efficient manner to the subject properties and that providing the service by alternate means is not within the public and environmental interest.

> 6. *Timetable.* All of the municipal services described above shall be available to the territory set forth in Exhibit "A" immediately upon annexation. Increased police patrols and fire prevention efforts will occur following annexation finalization. Sewer services, as described above, shall be provided as such area is developed. The existing sewer facilities are, or can be made, adequate to provide services to the annexed territory.
>
> The subject area has been serviced by the Town of Alta for several years by fire and police protection, avalanche warning, 911 emergency communications, library, and sewage disposal through the town dump station.

Petitioners' Brief, App. E, ¶¶ 5-6.[2]

---

2. Petitioners' Appendix E omits above quoted paragraph 5 "*Need for municipal services*" and therefore incorrectly numbers above quoted paragraph 6 "*Timetable*" as paragraph 5. Petitioners assert that upon purchasing their lots in 1984, they requested "Alta, at Petitioners' expense, to allow Petitioners to connect to Alta's municipal water and sewer services *as provided in the annexation proceedings*, so they could obtain a building permit to build a residence." *Petitioners' Brief* at 3 (emphasis added). This is a misstatement of the results and intent of the Albion Basin Policy Declaration. As is readily noted from the above-quoted text, the Policy Declaration conferred no rights upon any land owners within the Albion Basin to connect to Alta's municipal water service.

C. The terms of the 1981 Policy Declaration were not amended to include assurances that water would be provided to the Albion Basin.

The Haiks argue that certain statements were made by Alta's mayor in the course of the annexation hearings suggesting that Alta intended to include water as one of the services ~~to~~ be provided to the Albion Basin. But such a contention is obviously without merit when the Minutes of the July 16, 1981 hearing are examined. Petitioners relied on these same Minutes in their principal memorandum filed in support of their motion for summary judgment. Among other matters, the Minutes disclose (1) that *the Town council "has no intention of changing any existing agreements with outside agencies*" — a statement which in context obviously refers to the 1976 Water Supply Agreement with Salt Lake City; (2) that Mr. Cahill asked "that [the council] review the sewer and water connection fees and that David [Nicponski] noted that the *basin people will not realize either one as they will not be able to hook up onto either system because of the location of this area*"; and (3) "that Bill Hoge, property owner, has no objection to this proposal but asks the council if they would be interested in augmenting their water supply for the Town with a water reservoir in the basin. The mayor stated that the Town will do everything possible to regularize the water supply in the basin and we will do this in cooperation with Salt Lake City Water Department. *We will do and will try to work something out with the Water Department, as they actually have full control over the water in the canyon.* We could talk in terms of a control reservoir and try our best to work with everyone concerned."

Respondent Alta's Brief, App. D, at 14a-16a (emphasis added).

The only reasonable interpretation of these minutes is that Salt Lake City held all the cards in the Albion Basin and that, in 1981, no water hookups could be anticipated.

On these facts, and construing all permissible inferences in favor of the Petitioners, the district court held:

> Alta's 1981 Policy Declaration may itself have some binding force, but informal statements by the Mayor in the context of the annexation discussions do not operate as an amendment to that document adding water service to the services listed in paragraph 5. "The policy declaration, including maps, may be amended from time to time *by the governing body after at least 20 days notice of public hearing*." UTAH CODE ANN. § 10-2-414 (1996) (emphasis added). Nothing in the statute confers upon the Mayor the power to amend. Nor may the Mayor's promise be read into the annexation ordinance as a matter of "statutory construction."

Petitioners' Brief, App. B, at 38a. The Haiks did not challenge this holding in their appeal to the Tenth Circuit and are, therefore, precluded from raising it in their instant petition. Neither did they assert in their appeal to the Tenth Circuit the doctrine of promissory estoppel upon which they implicitly relied.[3] Accordingly, they are also precluded from raising that issue now.

---

3. The district court noted: "The Haiks would now enforce these statements against Alta, apparently as a matter of promissory estoppel." However, . . . "Utah recognizes the general rule precluding a party from asserting estoppel against the government. *Utah State University v. Sutro & Co.*, 646 P.2d 715, 718 (Utah 1982)." *Petitioners' Brief, App. B*, at 36a-37a.

IV.

THE DISTRICT AND CIRCUIT COURTS CORRECTLY CONCLUDED THAT NO TAKING OCCURRED BECAUSE THE HAIKS PURCHASED LAND THAT LACKED THE RIGHT TO RECEIVE 400 GALLONS OF CULINARY WATER PER DAY, A PREREQUISITE TO DEVELOPMENT OF THE LAND.

The Haiks brought their taking claim solely against Alta based on an alleged violation of Article I, Section 22 of the Utah Constitution, which provides: "Private property shall not be taken or damaged for public use without just compensation." To succeed on a regulatory taking claim, it is axiomatic that the governmental entity enact some regulation that affects the property — which Alta did not do. More fundamentally, to succeed on such an allegation, a claimant first "must possess a protectable interest in property that is taken or damaged for public use." *Bagford v. Ephraim City*, 904 P.2d 1095, 1097 (Utah 1995). Moreover, as the Tenth Circuit explained, the "mere expectation of municipal water service in the future is not a legal right that constitutes property subject to taking." *Petitioners' Brief, App. A*, at 16a (citing *Bagford, supra*, at 1099). The first issue, therefore, in evaluating the Haiks' taking claim is whether they ever possessed the right to build on their property.

In evaluating this first issue, the district court reached the undisputed conclusion that the Haiks own exactly what they originally purchased in 1994: "lots in the Albion Basin Subdivision #1 with appurtenant water rights limited to 50 gallons per day per unit under the 1963 agreement." *Petitioners' Brief, App. A*, at 15a. As the court further noted, the Haiks lacked the critical right that their predecessor in

interest also lacked: "the legal right to use water in an amount sufficient to satisfy the health department requirement of 400 gallons per day per unit." *Id.* Based on these undisputed facts, the circuit court held: "The Haiks cannot maintain a taking claim because they did not have a protectable interest in property that was taken or damaged by Alta's denial of a building permit." *Id.*

The Haiks' attempt to sidestep the above conclusion by arguing *for the first time* that the "proscribed use" is not a nuisance and, therefore, Alta must compensate them for their preexisting inability to build on their property. *Petitioners' Brief* at 9-11. There are, however, two other problems with this argument: First, it presupposes that the Haiks had a protectable property interest that Alta took from them, thus rendering the property without any economic use. Second, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1002 (1992), is not as narrowly limited as the Haiks suggest. These two points are addressed below.

Ostensibly relying on *Lucas*, *supra*, the Haiks argue that Alta must compensate them for a taking because "[l]egislation that eliminates all economic use must derive from the state's law of private nuisance or its police power authority to protect against emergencies." *Petitioners' Brief* at 9. Importantly, the Haiks have never offered any evidence that there once was an "economic use" which has now been "eliminated" by Alta's adherence to the Salt Lake County Health Code. As the district court concluded, the Haiks now have exactly what they had when they originally purchased the property. *Petitioners' Brief, App. A*, at 15a.

The Haiks' argument is further undermined by the two cases they rely upon in making their "nuisance" argument:

Lucas, supra, and *Colman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990). In *Lucas*, the landowner, who purchased his property in 1986, had a right to develop his land until the passage of the Beachfront Management Act in 1988. *Lucas*, 505 U.S. at 1006. Similarly, in *Colman, supra*, the lessee operator of an underwater brine canal held a property interest (easement) allowing him to extract minerals from the canal until the enactment of the Great Salt Lake Causeway Act. That Act authorized breaching of a causeway and threatened Colman's ability to further use the canal. *Colman*, 795 P.2d at 623-24. In both cases, unlike the Haiks' case, the affected parties held protected property interests which were subsequently affected by the government's newly enacted legislation. *See also Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed.Cir. 1994) (following *Lucas* and stating that one element of a regulatory taking requires "an interest vested in the owner, as a matter of state property law, *and* not within the power of the state to regulate under the common law nuisance doctrine") (emphasis added).

The Haiks' "nuisance" argument also relies on a strained and extremely narrow reading of *Lucas*. The *Lucas* court discussed the development of the "harmful or noxious uses" principle and its evolution into the modern recognition that government can, without compensation, eliminate all economic use of land if such action derives from the power to prevent public harm. *Lucas*, 505 U.S. at 1021-24. Although the *Lucas* court discussed this ability in terms of police power and prevention of nuisance, the foundation for the court's decision was the recognition that there can be no taking where the property owner had no prior right to a particular use of the property. In the words of this Court:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use,

> we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property.

Lucas, 505 U.S. at 1027 (footnote omitted).

To determine what interests were not part of the owner's title, the *Lucas* court directed us to look at "the restrictions that background principles of the State's law of property *and* nuisance already place upon land ownership." *Id.* at 1029 (emphasis added). The court further explained:

> In light of our traditional resort to "existing rules and understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments, . . . this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional.

Id. at 1030 (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-1012 (1984); *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring)); *see also*

Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690, 694 (8th Cir. 1996) (following *Lucas* and indicating that the "regulatory action [banning billboards] may well have the effect of eliminating the land's only productive use, but it does not proscribe a productive use that was previously permissible."); *Hoeck v. City of Portland*, 57 F.3d 781, 788 (9th Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996) (demolition did not amount to taking since, under zoning law in effect at the time landowner took title, he had no right to use his property to maintain an abandoned structure).

In the present case, the Health Code requirements mandating sufficient culinary water as a prerequisite to development and a building code requiring a sufficient supply of culinary water are examples of such "existing rules and understandings" that legitimately bar the Haiks from putting their land to a proscribed use. As in *Lucas*, such a conclusion is surely unexceptional.

V.

THE DISTRICT AND CIRCUIT COURTS CORRECTLY CONCLUDED THAT THE HAIKS HAD NO TAKING CLAIM BECAUSE THEY PURCHASED THE PROPERTY AFTER THE RESTRICTING REGULATIONS WERE IN PLACE.

The Haiks argue it is irrelevant whether they purchased the property after the health code requirement of sufficient culinary water was in place "[b]ecause Petitioners have *lost* all economically beneficial use of their property. . . ." *Petitioners' Brief* at 11 (emphasis added). As pointed out above, however, the Haiks could not have lost that which they never possessed: "a legal right to use water in an amount

sufficient to satisfy the health department requirement of 400 gallons per day per unit." *Petitioners' Brief, App. A*, at 15a. Therefore, the Haiks are now essentially arguing that whenever undevelopable property is purchased a taking has occurred due to the preexisting regulation which prevents development.

In support of their argument, the Haiks ostensibly rely on several cases, principally one case from this court, *Nolan v. California Coastal Comm'n*, 483 U.S. 825 (1987). There are two problems with the Haiks' reliance on *Nolan*: First, it is an exaction case. Second, unlike the Haiks, when the Nolans purchased the property their bundle of rights included a right that was taken from them by the California Coastal Commission. Each of these arguments are addressed below.

In *Nolan*, the government conditioned the grant of a building permit to the Nolans on their transfer of an easement to the public to increase access to local public beaches. *Nolan*, 483 U.S. at 827-29. As the court eventually held, this exacted from the Nolans their basic right to exclude others from their property, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 831 (citations omitted) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)). In the Haiks' case, Alta has exacted *nothing* from the Haiks. Rather, Alta conditioned the Haiks building permit on the Haiks' ability to show that they possessed the right to receive culinary water sufficient to satisfy health code requirements. Unlike *Nolan*, the Haiks were not asked to give up any right, rather, they were asked to prove the existence of a right. Because neither they nor their predecessors ever held such a right, Alta's denial of their building permit affected no taking of property from the Haiks.

The Haiks also argue that *Nolan* supports their taking claim because the Nolans knew, prior to their purchase of the property, of the Coastal Commission's policy of exacting public easements in exchange for building permits. Thus, the Haiks argue by implication that they suffered a taking even though Alta's requirement of sufficient culinary water was in place prior to their purchase. This argument runs counter to the Haiks' continual representations that they knew of no such requirement prior to their purchase. More fundamentally, however, such an argument is not supported by *Nolan* for two reasons: First, the Nolans purchased their property after the California Superior Court granted their writ of mandamus and struck down the permit condition but before that court was reversed by the California Court of Appeal. *Nolan*, 483 U.S. at 829-30. Therefore, the Nolans purchased the property with a right to build without exaction. Second, the *Nolan* court noted that, although the Nolans' rights were not altered because they purchased the property with knowledge of the Commission's exaction policy, "so long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.* at 833, n.2. However, the Haiks' predecessors in interest also possessed no water rights sufficient to satisfy health code requirements. Therefore, Alta could (and did) deny those predecessors the very request the Haiks now seek. *See Petitioners' Brief, App. B*, at 19a-25a (detailing, in part, the Haiks' predecessor's (Marvin Melville's) denial of a building permit due to his inability to meet the same culinary water requirement). *See also Melville v. Salt Lake County*, 570 P.2d 687, 689 (Utah 1977) (Melville's attempts to develop the same property.).

The Haiks also cite three other cases ostensibly in support of their argument that preexisting restrictions do not defeat a taking claim. However, all of the cases are distinguishable. For example, in *Del Monte Dunes at Montery, Ltd. v. City of Montery*, 95 F.3d 1422 (9th Cir. 1996), *aff'd on other grounds*, __ U.S. __, 119 S. Ct. 1624 (1999), Del Monte purchased the property from Ponderosa Homes while Ponderosa's application for a building permit was pending. *Del Monte Dunes*, 95 F.3d at 1425. Del Monte continued to pursue the permit until it was eventually denied five years later. *Id.* During the pendency of the application process, the City progressively sought more conditions for development until, argued Del Monte, that no part of the property had any economically beneficial use. *Id.* at 1433. Obviously, this is quite different from the Haiks' case, in which the condition of sufficient culinary water existed prior to the Haiks' purchase of land and application for a building permit. Moreover, *Del Monte* involved the discretion of the City to set its own conditions for development. In the present case, Alta had no discretion to circumvent or ignore the county health code.

The Haiks also rely upon another Ninth Circuit case, *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990). They argue that "the district court completely ignored the fact that several of the plaintiffs in that case did not purchase their land until the challenged moratorium that prevented them from getting water had been in place for eight to ten years." *Petitioners' Brief* at 12. In *Lockary*, however, the question was whether a loss of all economically beneficial use was caused by an actual water shortage. *Lockary*, 917 F.2d at 1154. Like *Del Monte, supra*, the question in *Lockary* was whether there had been an uneven use of discretion. In the Haiks' case, Alta exercised no discretion by enforcing the preexisting county health code.

Finally, the Haiks cite a case from the Court of Federal Claims, *Bowles v. United States*, 31 Fed. Cl. 37 (1994), and represent that Bowles knew of the offending government permit requirement prior to his application to build. However, the *Bowles'* court, in reviewing the evidence presented at trial, explained that Bowles reasonably did *not* believe that the preexisting permit requirement applied to his property. *Bowles*, 31 Fed. Cl. at 51. Moreover, the *Bowles'* court relied on *Lucas, supra*, and as explained above, *Lucas* teaches that no taking occurs when the property owner had no prior right to do that which the regulation prohibits.

CONCLUSION

Petitioners' equal protection claims are premised on the novel theory that the Town of Alta should have been willing to breach its Water Supply Agreement with Salt Lake City by extending its water lines beyond its 1976 boundaries so the Petitioners could satisfy culinary water supply regulations that had been in effect in the Albion Basin for more than twenty years. Applying the highly deferential standard of equal protection review, the courts below rejected Petitioners' equal protection claims. There was nothing exceptional in the analysis or the results.

Petitioners' takings claim is also imaginative and equally unsound. They contend that the Town of Alta deprived them of a protected property interest under state law, i.e., the right to a legally sufficient water supply to develop their Albion Basin lots when, in fact, no such interest ever existed. Petitioners purchased lots that were not entitled to the 400 gallons per day of culinary water required under long standing state and local regulations. Applying recent decisions of this Court and the Utah Supreme Court, the courts below correctly concluded that Alta could not take what Petitioners never had.

For the above reasons, the Town of Alta respectfully requests that the Court deny Petitioners' Writ for Certiorari.

Respectfully submitted,

CRAIG V. WENTZ
DAVID C. RICHARDS*
CHRISTENSEN & JENSEN, P.C.
Attorneys for Respondent
Town of Alta, a political subdivision
of the State of Utah
50 South Main Street
Suite 1500
Salt Lake City, Utah 84144
(801) 355-3431

* *Counsel of Record*

APPENDIX A — AFFIDAVIT OF KENT R. MINER DATED AND FILED JANUARY 22, 1997

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. F-2-96-CV-0732

RAYMOND A. HAIK; MARK C. HAIK,

Plaintiffs,

vs.

THE TOWN OF ALTA, a political Subdivision of the State of Utah, and SALT LAKE CITY CORPORATION, a political Subdivision of the State of Utah,

Defendants.

AFFIDAVIT OF KENT R. MINER

I, Kent R. Miner, being first duly sworn on oath, state as follows:

1. I am a resident of Salt Lake County, State of Utah, and am over the age of 18 years.

2. I am employed by the Salt Lake City-County Health Department and currently serve as the Director of the Bureau of Environment of Sanitation and Safety, Division of Environmental Health.

Appendix A

3. I have personal knowledge of the facts testified to in this affidavit and, if called and sworn as a witness, I could so testify.

4. I have been employed by the City-County Health Department since October 26, 1971. During that period of time, I have become familiar and have had direct involvement with health and drinking water regulations affecting the development of real property. I am also familiar with such regulations as they apply to the Albion Basin, which is located within the Salt Lake City watershed at the head of Little Cottonwood Canyon.

5. No later than 1971, water supply regulations were in effect and applicable to the Albion Basin area requiring the physical and legal availability of 400 gallons of drinking water per day per structure. Those standards or regulations are still applicable today and are codified in the Utah Administrative Code, R. 309-105 *et seq*.

6. The Town of Alta will not issue building permits unless our department establishes that the 400 gallon per day standard is satisfied.

7. The Health Department has consistently refused to approve building permits within the Albion Basin unless the Basin owners can demonstrate their ability to satisfy the 400 gallon per day per structure requirement.

DATED this 22nd day of January, 1997.

/s/
Kent R. Miner

APPENDIX B — REPLY AFFIDAVIT OF MAYOR WILLIAM H. LEVITT DATED AND FILED APRIL 8, 1997

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. F-2-96-CV-0732

RAYMOND A. HAIK; MARK C. HAIK,

Plaintiffs,

vs.

THE TOWN OF ALTA, a political Subdivision of the State of Utah, and SALT LAKE CITY CORPORATION, a political Subdivision of the State of Utah,

Defendants.

REPLY AFFIDAVIT OF
MAYOR WILLIAM H. LEVITT

I, William H. Levitt, being first duly sworn on oath, depose as follows:

1. I am the Mayor of the Town of Alta. I have been the Mayor since 1971.

2. I have personal knowledge of the facts testified to in this affidavit.

3. I was intimately involved in deliberations, meetings and public hearings concerning the proposed 1981

annexation of the Albion Basin and related issues involving the Town's 1976 Water Supply Contract with Salt Lake City.

4. I have reviewed the March 17 and March 18, 1997 affidavits of Joseph S. Knowlton and Richard J. Nelson regarding their recollection of a meeting at Dr. Robert Wolfe's home where the topic was the 1981 annexation of the Albion Basin. I don't remember whether the meeting they described in their affidavits occurred before or after the annexation ordinance was adopted.

5. Mr. Nelson and Mr. Knowlton both recall that water was not a topic of discussion at that meeting. I agree. It was not discussed because both Nelson and Knowlton had water contracts for their existing cabins with Little Cottonwood Water Company.

6. It's also true that we talked about municipal services other than water that the Town would offer to Albion Basin residents upon annexation, including fire protection, police protection, avalanche warning notification and library services.

7. Sewer service was also discussed. But only in terms of Albion Basin owners' access to the Town's sewer dump station at reduced rates. The Town has never had any plans or made any proposals for the extension of sewer lines into the Albion Basin.

8. I have also reviewed the affidavit filed by Marvin Melville regarding his recollection of topics discussed in connection with the 1981 annexation of the Albion Basin.

Appendix B

9. Mr. Melville is mistaken that no mention was made at the hearings or in subsequent discussions concerning the Town's ability to provide water to the Albion Basin subdivision. The minutes of the Town's July 16, 1981 public hearing made it very clear that the Town had no intention of changing its 1976 Water Supply Contract with Salt Lake City. It was also made clear at the hearing and in subsequent discussions with owners that water and sewer connection fees would not be at issue because the 1976 Contract did not allow the Town to extend its water system beyond the Town's 1976 boundaries.

10. Some time after March 11, 1988, I received a letter from LeRoy W. Hooton, Director of Salt Lake City's Department of Public Utilities. A true and accurate copy of Mr. Hooton's letter is attached. Mr. Hooton was responding to my earlier request that Salt Lake City approve, under the terms of the 1976 Water Supply Agreement, an extension of Alta's water lines into the Albion Basin annexation area. I referred Mr. Hooton's March 11 letter to John Guldner, and requested that he inform Marvin Melville that Salt Lake City had refused the Town's request. Mr. Melville had asked the Town make another attempt to secure Salt Lake City's approval for an extension of the Town's water lines beyond the Town's 1976 boundaries.

DATED this 8th day of April, 1997.

/s/
Mayor William H. Levitt

Appendix B

SALT LAKE CITY CORPORATION
Department of Public Utilities
Water Supply & Waterworks
Water Reclamation
1530 South West Temple
Salt Lake City, Utah 84115

March 11, 1988

Mayor William Levitt
Town of Alta
Alta, Utah 84092

Dear Mayor Levitt:

We recognize that there are existing authorized uses of private property in the Albion Basin which are only cabins with intermittent use. We feel that any further expansion beyond this limited existing use, especially commercial development, would adversely affect water quality in Little Cottonwood Canyon and would not be consistent with Salt Lake City's Watershed Management Plan (the page applying specifically to Little Cottonwood Canyon is attached).

We wish to point out that, in our existing water supply contract with the Town of Alta (dated 1976), it specifically states that the Town of Alta cannot expand its water system into areas outside of the town limits (as defined at the time of the contract) without the consent of Salt Lake City. Our Department will certainly not approve any expansion of Alta's water system into the Albion Basin.

Appendix B

The Salt Lake City Watershed Management Plan, developed after extensive public meetings and input, and which is now being considered by the City Council, further indicates that much of the private land in Albion Basin should be acquired as part of Salt Lake City's Watershed Acquisition Plan to preserve water quality in Little Cottonwood Canyon.

Sincerely,

/s/
LEROY W. HOOTON, JR.
Director

WE/co
90:54

Appendix B

LITTLE COTTONWOOD CANYON WATERSHED MANAGEMENT

Recommendation: Salt Lake City should maintain the existing watershed management practices in Little Cottonwood Canyon. Private lands in critical watershed areas should be considered as part of the recommended land acquisition program.

Salt Lake City should develop an inter-local agreement with Sandy City, Town of Alta and other communities with major watershed responsibilities in Little Cottonwood Canyon to define objectives for watershed management, delineate roles and responsibilities in the Canyon, and outline polices to be pursued in the Canyon.

Implementation: 1988 for inter-local agreement, ongoing.

Explanation: Little Cottonwood Canyon has the best water quality of all the Wasatch Mountain canyons used for Salt Lake City water supply. The excellent water quality is maintained despite heavy and increasing recreational use. Salt Lake City, Alta Town, Salt Lake County Service Area #3, and private users have utilized effective watershed management practices to control potential water quality deterioration. Salt Lake City should continue to work closely with other Little Cottonwood Canyon jurisdictions to retain excellent water quality and to be vigilant in watershed protection measures.

Salt Lake City shares water rights in Little Cottonwood Canyon with other municipal entities, most notably Sandy

City. Informal coordination between the municipalities has been good, but no joint policies have been developed to assure a long-term relationship and establishment of practices and responsibilities between these Canyon water rights owners. Sandy City expressed support for the inter-local agreement option of the Draft Watershed Management Plan. To delineate working relationships in the Little Cottonwood Canyon watershed, establish notification procedures for Canyon activities, and solidify general policy approaches for watershed protection, Salt Lake City should establish an interlocal agreement for the Canyon.

The Town of Alta and several respondents have noted the large amounts of developable private land in the Upper Canyon that could adversely affect the watershed. Salt Lake City should evaluate these private properties as part of the broader land acquisition program recommended in this Proposed Plan.

APPENDIX C — RELEVANT CODES

Utah Code § 10-2-401

UTAH CODE § 10-2-401. **Legislative policy.**

The Legislature hereby declares that it is legislative policy that:

(1) sound urban development is essential to the continued economic development of this state;

(2) municipalities are created to provide urban governmental services essential for sound urban development and for the protection of public health, safety, and welfare in residential, commercial and industrial areas, and in areas undergoing development;

(3) municipal boundaries should be extended, in accordance with specific standards to include areas where a high quality of urban governmental services is needed and can be provided for the protection of public health, safety, and welfare and to avoid the inequities of double taxation and the proliferation of special service districts;

(4) areas annexed to municipalities in accordance with appropriate standards should receive the services provided by the annexing municipality, subject to Sections 10-2-422 and 10-2-424, as soon as possible following the annexation;

(5) areas annexed to municipalities should include all of the urbanized unincorporated areas contiguous to municipalities, securing to residents within the areas a voice in the selection of their government;

(6) decisions with respect to municipal boundaries and urban development need to be made with adequate consideration of the effect of the proposed actions on adjacent areas and on the interests of other government services and the ability to deliver the services under the proposed actions, and on factors related to population growth and density and the geography of the area; and

(7) problems related to municipal boundaries are of concern to citizens in all parts of the state and must therefore be considered a state responsibility.

* * *

Utah Code § 10-2-422

UTAH CODE § 10-2-422 **Bonds not affected by boundary adjustments or annexation — Payment of property taxes.**

(1) A boundary adjustment or annexation made under authority of this chapter may not jeopardize or endanger any general obligation or revenue bond.

(2) Any bondholder may require the payment of property taxes from any area that:

(a) was included in the taxable value of the municipality or other governmental entity issuing the bond at the time the bond was issued; and

(b) is no longer within the boundaries of the municipality or other governmental entity issuing

the bond due to the boundary adjustment or annexation.

* * *

Utah Code § 10-2-424

UTAH CODE § 10-2-424 **Electric utility service in annexed areas.**

Whenever the electric consumers of the area being annexed are receiving electric utility services from sources other than the annexing municipality, the municipality may not, without the consent of the electric utility, furnish its electric utility services to the electric consumers until the municipality has reimbursed the electric utility company which previously provided the services for the fair market value of those facilities dedicated to provide service to the annexed area. If the annexing municipality and the electric utility cannot agree on the fair market value, it shall be determined by the state court having jurisdiction.

* * * *

APPENDIX D — MINUTES OF PUBLIC HEARING DATED JULY 16, 1981

PUBLIC HEARING
JULY 16, 1981
ALBION BASIN POLICY DECLARATION

The Mayor read a letter from L/ roy Hooton, Director of the Salt Lake City Water Department. See attached copy for your records.

The meeting was then turned over to Dave Nicponski who gave a presentation on the history, tax consequences and other important facts concerning this Policy Declaration and how it will effect the land and home owners in this area.

He noted that we have been contacted by many property owners asking that we move on the annexation of this area to the Town of Alta. Also, with the advent of the two new lifts, we will be running into some jurisdictional problems. This represents an urbanized development and with it the Town of Alta will be called to provide support services. It shall also be noted that he Town of Alta has contacted all outside agencies and they have received no objections to this proposal.

We have to address the problem of who will handle the problems that arise with the building of these two lifts. (Salt Lake County, Town of Alta, Forest Service, Watershed). The winter season is approaching and we must address this situation as soon as possible. The Town of Alta will not participate in the duplication of services to this area.

The proposed area map was presented.

Appendix D

The Town Council has taken the following positions on this area.

1. It has no intention of changing any existing agreements with outside agencies.

2. The Town of Alta will retain the present zoning of this area as exists with Salt Lake County, of this area, and does not contemplate any changes. The tax consequences were addressed by using the chart that was furnished to the Town Council. With this annexation there will be an increase in the property tax to the residents that live in this area. It is the Town of Alta's contention that this increase will be offset by the services that this Town will provide. (Fire rating from a 10 to a 7, police protection, no Alta Central requested, sewer dump station rate lowered).

The Town is saying that if you own a home in this area you will save by annexing to the Town. This might not be the case if you just own land. But it might enhance the property value of your land.

This is a Town initiated annexation and that is what the amendments did and we did this for the above stated reasons.

The amount of money that will be returned to the Town as far as a tax is concerned is not that much. At the most, $5,000.00 a year.

The meeting was opened for discussion:

John Cahill asked if the fire rating will pertain to this area, as there are no fire hydrants in the area and the road is not

passable 9 months out of the year. The Mayor stated that when Secret Lake annexed they did receive the benefit of the Town's rating. It is a Town wide rating.

Mr. Cahill asked if his tax on his mining claims will be affected by the tax increase. It was noted that on mining claims, the tax is paid to the State and not the County.

Mr. Cahill asked that we receive the sewer and water connections fees and Dave noted that the basin people will not realize either one as they will not be able to hook on to either system because of the location of this area. The building permit fees are set by the Building code followed by the County.

Andrew Jurek, property owner, asked if and when we annex the Albion Basin area and road will we maintain this road. The Forest Service says that in their plan for 1982, they will try to upgrade the road and grade it.

Marv Melville, property owner, after a meeting with the Mayor, Mr. Morton and the Town has a petition signed by many property owners requesting that the Town set a 120 time period during which the property owners can digest the materials now available on this proposed annexation. He stated that it is his opinion that most of the owners, except for possibly one, would lean toward wanting to be a part of Alta Town. Mr. Norman Tanner did ask why we chose to draw the boundary the way we did as opposed to following the ridge line and we simply felt it was easier to draw it on the section lines. Our attorney did advise us that we can change this line but we will have to amend this declaration and go through the same procedure again.

Appendix D

Mr. Norman Tanner, property owner, feels that if 30 days would not pose an inconvenience to the Town, he would like to change his position and would like to go on record as being in favor of this annexation.

Jeanne Harmer, property owner, asked if those people that want to annex could go ahead annex and not wait the 30 days.

Gary Lund, property owner, stated that he would like to go on record as favoring this annexation. He also talked to Mr. Frohlich from Auburn, Maine and he also would like to support this annexation.

Bill Hoge, property owner, has no objection to this proposal but asked the Town Council if they would be interested in augmenting their water supply for the Town with a water reservoir in the basin. The Mayor stated that the Town will do everything possible to regularize the water supply in the basin and we will do this in cooperation with the Salt Lake City Water Dept.

We will do and will try to work something out with the Water Department, as they actually have full control over the water in the canyon. We could talk in terms of a controlled reservoir and try our best to work with everyone concerned.

Dave Nicponski also noted that if this area is annexed and you wish to become a voting resident of this Town you may do so. You have that option.

Mr. Melville asked about the collection of the permit fees from the Ski Lifts. It was explained that we will collect these

fees and hold them in escrow until such time (30 days from now) the Annexation ordinance is either passed or rejected. If rejected, the fees will be passed on to the appropriate agency.

For the record: the Mayor stated that we are now acting as Town Council on the Policy Declaration

There was a motion made by Jim Shane to adopt the Proposed Policy Declaration for the Albion Basin Area. There was a second by Chic Morton.
A roll call vote was taken.

Doug Christenson	aye
Al Kapp	aye
Bill Levitt	aye
Chic Morton	aye
Jim Shane	aye

The vote was unanimous with all present and voting in favor.

[Corrected and removed from Public Hearing. Appears on p. 3A Regular Minutes]

Jeanne Harmer was concerned about paying their fire insurance premium and using the sewer dump station now when in fact if they wait 30 days they will get a lower rate on both. It was noted that they should notify their insurance company of this proposal, pay the premium and anticipate a refund when they come under our rating in 30 days. The same is true with the dump station. We will refund their money if in fact the area is annexed.

Appendix D

Marv Melville did note that a petition from some property owners showing concerns about this annexation was received by the Town. But he would like to meet with a representative from the Town and go over all the details and questions with regard to this proposal.

The Mayor reassured everyone that we do and will answer any questions or concerns anyone has with regard to this proposal to annex.

Chic Morton, speaking as the manager of the Ski Lifts, would like to say that the cooperation and assistance from Alta Central, the Marshal's office and many others has been great and they would like to continue to work with the Town in this area.

There was a motion that the Town Council pass an ordinance annexing the Albion Basin property as incorporated in the Policy Declaration and that ordinance will be subject to the following:

1. *this ordinance will not be effective or signed until the 20th day of August, 1981 at which time the regular Town Council meeting will be held.*

2. *that any party having a question on the annexation or objection to the annexation may submit comments and input during this period of time and appear before the Town Council prior to the finalization of this particular annexation.*

3. *any fees or permits collected during this 30 day time period will be held in escrow until this annexation is finalized. Should it not be finalized, the monies will be transferred to the proper agencies had we not annexed.*

Appendix D

Jim Shane seconded this motion. A roll call vote was taken.

Doug Christenson	aye
Al Kapp	aye
Bill Levitt	aye
Chic Morton	aye
Jim Shane	aye

The vote was unanimous with all present and voting in favor.

[Corrected and removed from Public Hearing. Appears at p. 3A Regular Minutes]

CORRECTION ON JULY 16, 1981
TOWN COUNCIL MINUTES
Page 3-A

The following is to be deleted from the Public Hearings minutes of July 16, 1981 and to be made a part of the Regular Town Council Minutes.

This page number will read as follows 3-A.

There was a motion made by Jim Shane to adopt the Proposed Policy Declaration for the Albion Basin Area. There was a second by Chic Morton. A roll call vote was taken.

Doug Christenson	aye
Al Kapp	aye
Bill Levitt	aye
Chic Morton	aye
Jim Shane	aye

The vote was unanimous with all present and voting in favor.

Appendix D

There was a motion that the Town Council pass an ordinance annexing the Albion Basin property as incorporated in the Policy Declaration and that ordinance will be subject to the following:

1. *This ordinance will not be effective or signed until the 20th day of August, 1981 at which time the regular Town Council meeting will be held.*

2. *That any party having a question on the annexation or objection to the annexation may submit comments and input during this period of time and appear before the Town Council prior to the finalization of this particular annexation.*

3. *Any fees or permits collected during this 30 day time period will be held in escrow until this annexation is finalized. Should it not be finalized, the monies will be transferred to the proper agencies had we not annexed.*

Jim Shane seconded this motion. A roll call vote was taken.

Doug Christenson	aye
Al Kapp	aye
Bill Levitt	aye
Chic Morton	aye
Jim Shane	aye

The vote was unanimous with all present and voting in favor.